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**No. 21167**

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

PEARLEY M. LEWIS and MILDRED C.  
LEWIS,

Appellants,

v.

STEWART L. UDALL, as Secretary of  
the United States Department of the  
Interior, et al,

Appellees.

On appeal from the  
United States District  
Court for the  
District of Arizona

**BRIEF FOR APPELLANTS**

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**FILED**

OCT 10 1966

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**No. 21167**  
IN THE  
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FOR THE NINTH CIRCUIT

PEARLEY M. LEWIS and MILDRED C.  
LEWIS,

Appellants,

v.

STEWART L. UDALL, as Secretary of  
the United States Department of the  
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Appellees.

On appeal from the  
United States District  
Court for the  
District of Arizona

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from an order entered May 16, 1966, by the District Federal Court for the District of Arizona, denying Plaintiffs' motion for reconsideration of the opinion and order granting Defendants' summary judgment (R. 221) and the order entered March 22, 1966, denying Plaintiffs' motion for summary judgment and granting Defendants' motion for summary judgment (R. 193). The underlying action was brought by the Appellants Perley M. Lewis and Mildred C. Lewis on March 12, 1965, against Appellees and pursuant to The Administrative Procedure Act (5 U.S.C. 1009) at Chapter 85, 28 U.S.C. 1361, as amended by Public Law 87-748, 76 Statutes 744, approved October 5, 1962, for the purpose of obtaining judicial review of the decisions of the Defendants setting aside,



vacating and cancelling the sale of public lands to Appellants, (which decision reversed previous decisions of the Appellees, at least one of which was final, approving the application of Appellants to purchase public lands and declaring Appellants the purchase thereof), and for a decree cancelling the adverse decision of Appellees and directing the Appellees to issue to Appellants a cash certificate and patent to the public lands involved. The public lands involved are in Maricopa County, State of Arizona (R. 3)<sup>1</sup> In response to the action, Appellees filed a motion for summary judgment (R. 19-35 ) and Appellants filed an opposition to Appellees' motion for summary judgment and Appellants' own motion for summary judgment (R. 36-190).

The matter was thus submitted after oral argument before the court, the Honorable Walter Craig presiding, and on March 22, 1966, the court entered its order granting Appellees' motion, denying Appellants' motion and directing entry of judgment for Appellants.

Appellants then filed a motion for reconsideration and a memorandum in support thereof (R. 196-216) which, after hearing had without oral argument before the same honorable judge, was denied on May 16, 1966 (R. 221).

Opinion denying Appellants' motion for summary judgment and granting Appellees' motion for summary judgment was duly entered (R. 193).

This court has jurisdiction by virtue of 28 U.S.C. 1291.<sup>2</sup>

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<sup>1</sup>"R" references are to record on appeal in the court below and the proceeding in that court which have been filed as the certified record.

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<sup>2</sup>Section 10(e) of The Administrative Procedure Act says in part: "Scope of Review—So far as necessary to a decision where presented, the reviewing court shall decide all relevant questions of law, and interpret all constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (b) hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law; . . .".

It is the position of Appellants that the Appellees performed acts outside of the law and such acts were therefore not committed to agency discretion.

## STATEMENT OF THE CASE

### (a) INTRODUCTION

The statutes and regulations of the Department of the Interior and the proceedings before the Department, the trial court and on this appeal, which are involved in this appeal, are as follows: The Taylor Grazing Act, specifically Section 7 thereof (43 U.S.C 315 (f) which provides in part as follows:

"... Upon the application of an applicant qualified to make entry, selection or location under the Public Land Laws and filed in the Land Office of the proper district, the Secretary of the Interior *shall* cause any tract to be classified in such application, if allowed by the Secretary of the Interior, *shall* entitle the applicant to a *preference right to enter*, select or locate such land, if open to entry as herein provided." (Emphasis supplied).

Also involved are the statutory provisions of Section 14 of The Taylor Grazing Act (43 U.S.C. 1171, as amended 1947) which provides in part as follows:

"Section 1171. Notwithstanding the provisions of Sections 678, 212, 321, 662 and 945 of this title, it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the Land Office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding 1,500 acres, which in his judgment it would be proper to expose for sale after at least 30 days notice by the Land Office of the district in which such land may be situated; provided, that for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right, the Secretary of the Interior is authorized to make an equitable division of

the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price; . . . .”

Since the classifications for land disposals, under the Public Land Laws (including but not restricted to Section 14 of The Taylor Grazing Act), are made pursuant to Section 7 of The Taylor Grazing Act heretofore quoted, it is pertinent to understand the terms used therein. According to Glossary of Public Land Terms put out by the Department of the Interior, an entry was defined as follows:

“In general, an allowed application which was submitted by an applicant who *will* acquire title to the land by payment of cash or its equivalent and/or by entering upon and improving the land.”<sup>3</sup> (Emphasis supplied).

The regulations involved are as follows: 43 C.F.R. 250.5 says:

“Effect of Application. The filing of an application in conformity with the regulations in this part will not segregate the lands applied for from other application under the Public Land Laws, or defeat a prior valid right initiated under any such law. However, until the issuance of a cash certificate, the authorized officer may at any time determine that the land should not be sold, the applicant or any bidder has no contractual or other rights as against the United States, and no action taken will create any contractual or other obligation of the United States.”

43 C.F.R. 250.11 says in part:

“(a) Declaration of high bidder. When all persons present shall have ceased bidding, the manager will, in the usual manner declare the bidding closed, subject to the preference right of purchasers or owners of contiguous land . . . , announce the amount of the highest bid and declare the offeror thereof . . . *the highest bidder*, provided that the buyer immediately pays to the manager the amount of the bid if he has not already done so . . . .” (Emphasis supplied).

“(4) If, by the end of the preference right period, no pref-

<sup>3</sup>Glossary of Public Land Terms, 1949, USDI, BLM, page 3.



erence right has been asserted, the sale will be *declared closed* and the manager may declare the highest bidder th *purchaser*." (Emphasis supplied).

Regulation 43 C.F.R. 250.12 (c) states as follows:

"When there has been full compliance with the regulations on his part, the manager *will* issue a cash certificate to the purchaser." (Emphasis supplied).

#### (b) HISTORY OF THE CASE

By reason of Appellee's motion for summary judgment in this matter, the facts as set forth by Plaintiffs are not in dispute. These facts are set forth in Plaintiffs' Complaint in paragraphs IV through VII of said Complaint (R. 6-14). The facts are again summarized in Appellants' response to Appellees' motion for summary judgment and Appellants' own motion for summary judgment. (R. 39-51)

The summary of these facts is as follows:

On April 25, 1956, an application for the sale of 160.62 acres of land, which is the subject matter of this action, was made by one Mary T. Rexroat for sale at public auction. Subsequently, on July 1, 1957, the Lewises filed their application for the sale of the same land.

Thereafter, the Land Office classified the land as suitable for public sale (see Exhibit One attached to Appellants' motion for summary judgment). The classification report made under Section 7 of The Taylor Grazing Act, stated:

"It is recommended that subject lands be classified as proper for sale at public auction at not less than the appraised value as applied for."

The same report found that the lands were appraised at \$50.00 per acre, or \$8,031.00 for the 160.62 acre tract. The lands were put up for sale under the Rexroat application, the land classification report having been approved by the Department on July 17, 1959. The notice of sale was duly published in accordance with the law and the rules and regulations of the Department of the Interior.

It is important to note that there were no conditions or reservations, contained in the notice of sale, which were not completely complied with by Plaintiffs. A copy of the form of notice for publication which was used at the time, is attached to Appellants' motion for summary judgment in the District Court action as Exhibit Four. This is also a part of the record. The form that was used at the time this case arose is not the same form in use at the present time. At the present time, the Department of Interior uses a notice for public sale which specifically contains a right in the authorized officer to reject any bids prior to the time of issuance of cash certificate. (See Exhibit Five attached to Appellants' motion for summary judgment).

The sale was held according to law in the Phoenix Land Office on November 3, 1959, with a number of persons bidding at the sale. The highest bid was some \$9,150.00 by Mary Rexroat who was the high bidder and was so declared, subject to the right of adjoining land owners to file preference right claims within thirty days, as allowed by law. Four applications for preference right claimants were filed. The Plaintiffs' application was one of these, and each of the preference right claimants paid the full bid price of \$9,150.00 to the Land Office and submitted proper proof of their right to preference.

By its decision dated December 4, 1959, the Land Office Manager declared them to be qualified preference right claimants and pursuant to 43 C.F.R. 250.11 they were given thirty days within which to divide the land. No preference right claim was made by the original applicant, Mary Rexroat, and her case was closed. A copy of the December 4, 1959 decision is attached to Appellants' motion for summary judgment as Exhibit Six (R. 89-90).

Proper procedures were taken under 43 C.F.R. 250.11 and by January 25, 1960 the parties had done everything required of them under the law and regulations to purchase the land. The only thing remaining to be done was the ministerial act of

the Manager in directing the issuance of cash certificate and patent. This the Manager failed to do for over five months.

While awaiting the ministerial acts some unusual circumstances occurred.

On February 23, 1960, after the successful bidders and purchasers had been waiting for almost a month for a cash certificate to issue, the office of the Secretary of the Interior issued a press release entitled "Further Safeguards Against Land Speculation Announced". A copy of this press release is part of the record and is attached to Appellants' motion for summary judgment as Exhibit Nine. (R. 93-98).

This so-called "policy" was not issued in the form of regulations, but instead was issued in the form of a press release dated February 23, 1960, and in short was entitled "A Broad Program of Safeguards Against Speculation in Land Sales Under the Public Sales Act."

As a result of these unpublished-in-the-Federal-Register non-regulation press release policies, the Manager of the Phoenix Land Office entered an order on June 6, 1960, (over five months after the Plaintiffs had done everything necessary to entitle them to the land), without prior notice, vacating the previous decision of the Manager on December 4, 1959, which had ordered disposal and division of the lands and vacated the sale held November 3, 1959 and rejected all applications. This decision said in part:

"These applications have been reviewed for compliance with the new departmental anti-speculation policy, which is entitled as follows: 'In connection with the functions of the Bureau of Land Management under authority of the Public Sales Act, Section 2455 R.S., no land *will be classified* as suitable for auction thereunder if; . . . (b) the land is within the influence of expanding cities or towns where the land uses are changing to more intensive uses.'" (Emphasis supplied).

It is to be noted here that this policy merely stated that no



land "*will be* classified" as suitable, whereas, in the instant case, the land had already been classified and this order acted as a revocation of the prior classification of suitability for sale. The decision went on to state:

"It is believed that the subject sale does not meet the criteria set by the new departmental policy, *and since this is a retroactive policy*, and must be applied to pending as well as new applications, Manager's decisions of December 4, 1959, sale of November 3, 1959 are hereby vacated and applications . . . rejected." (Emphasis supplied).

It is to be seen that the June 6, 1960 decision of the Acting Manager was based on a retroactive application of press release policies which were by their own terms, prospective.

The press release policy also condemned as a speculator anyone who purchased adjoining land in order to establish a preference right to become a purchaser of land to be sold at public auction under Section 14 of The Taylor Grazing Act (which is Section 2455 of the Revised Statutes, as amended therein), even though there was no law against speculating on the purchase of Federal land sold at public auction or attempting to purchase the same on such basis.

Appellants' motion for summary judgment states that the Appellants were considered speculators by the Department, as is shown by Exhibit A, (R. 75-78), attached to Appellants' motion for summary judgment; see specifically (R. 78) which is a letter signed by E. R. Rowland, State Supervisor, describing Appellants as speculators. This fact is admitted by the Government and not controverted by them in their response to Appellants' motion for summary judgment. For the purpose of this Appeal, it is deemed admitted by the Government that Appellants were considered speculators and this is one of the main reasons for the decisions denying their application.

Appeals of this decision followed and although there were originally four preference right claimants, three did not prosecute

their appeals in the various stages and their rights have long since been closed out by the Department, and the Department has stated that the Plaintiffs Lewis are the only ones having claim to the subject 160.62 acres of public land.

In its June 6, 1960 decision, the Acting Manager did not raise any questions as to the validity of the sale. The sole reason for the decision was a retroactive application of unpublished, non-regulation press release policies applied retroactively, and because of a unilateral decision that Mr. Lewis was a speculator, in violation of the press release.

The decision of June 6, 1960 was appealed by Appellants to the Director of the Bureau of Land Management, Washington, D. C. and on October 11, 1960 the Director affirmed the decision of the Acting Manager of the Phoenix Land Office. (Exhibit Eleven attached to Appellants' motion for summary judgment). On November 23, 1960, the Plaintiff's filed a notice of appeal to the Secretary of the Interior in Washington, D. C. from the decision of October 11, 1960 of the Acting Director. No decision was to be forthcoming on this appeal *for over three years*, until December 20, 1963. During this period of time some very interesting things occurred.

On February 14, 1961, Secretary of the Interior Udall announced through another press release a new so-called "Land Conservation Program" which was entitled "Secretary Udall Orders Public Land Moratorium." This policy was again not published in the Federal Register but the public was advised of the same through a press release. (See Exhibit Twelve attached to Appellants' motion for summary judgment (R. 111-119)).

With the Court's indulgence, some provisions of these press release policies are of vital interest to this case. The press release said in part:

"According to the policy statement, lands which cannot properly be developed under existing public land laws will

be retained in Federal ownership *until the necessary laws can be enacted*. The Department will no longer continue to try to force present-day land needs into the *unworkable straight-jacket of out-dated laws. . .*”

“. . . The policy statement broadens and supercedes a more limited statement of *anti-speculation policies* issued February 5th and 23rd, 1960.” (Emphasis supplied).

By this press release the Secretary announced his intention to ignore the regulations and the statutes until “the necessary laws” could be enacted, and until such event occurred the Department announced its intent to “no longer continue to try to force present-day land needs into the unworkable straightjacket of out-dated laws”, the mere fact that Congress had passed these laws to the contrary notwithstanding. This policy announcement was *not* carried into effect or supplmented by any rule or regulation.

Next, on January 24, 1963, the Department amended its regulations, specifically 43 C.F.R. 250.5, in an attempt to nullify all other regulations in this section and statutes, giving the Secretary unbridled and unreviewable power to stop any proceedings for the purchase of public lands prior to the issuance of a cash certificate. In furtherance of this end, in the same year, 1963, the Land Office inserted in its notice of public auction sales, the phrase giving them the same power. (See Exhibit Five attached to Appellants’ motion for summary judgment).

On April 19, 1963, without prior notice of hearing, and unknown to the Plaintiffs, one Robert M. Mangam, Deputy Assistant Director of the Interior, wrote a memorandum to the Director, Bureau of Land Management, on the subject appeal. (See Exhibit Thirteen attached to Appellants’ motion for summary judgment (R. 120)). This memorandum asked that the case record be returned to Phoenix for a determination of whether or not the appraised price in the file reflected the fair market value. Heretofore, the appraised value of the land had never been a point in issue in any of the prior decisions.

Thereafter, the files on the appeal were returned to the Arizona office for this purpose. Appellants were not advised by the Secretary's office that the files had been returned but Appellants became aware thereof by reference to the local Land Office's "Serial Register" and did inspect the file after return, and to their great surprise, the file contained a memorandum dated August 13, 1962, signed by one, Robert K. Coote, stating that from *"the record"* the amount paid was less than the fair market value at the time of the original sale. (See Exhibit Fourteen attached to Appellants' motion for summary judgment (R. 12)).

At this point, the Secretary had not yet issued his decision but this previous correspondence just noted indicated that the Secretary wanted to find that the land was worth much more at the time of the sale than it was originally appraised for. No new appraisal had been made but it could only be quite apparent to the local office what the appraisal must be, especially because in the file, *on the letterhead and paper of the Secretary of the Interior, was an original of an already prepared written decision, unsigned, rejecting the appeal on the grounds that the 1959 appraisal was too low.* And this decision was in the file *even though no subsequent appraisal had been made.* (See Exhibit Fifteen attached to Appellants' motion for summary judgment (R. 122)). One might wonder, logically, whether or not this could have influenced the local Land Office in their new appraisal?

Finally, on December 20, 1963, the Secretary's decision came down. (See Exhibit Twenty-two attached to Appellants' motion for summary judgment (R. 187-189)). The first three paragraphs (almost the entire first page) and the last paragraph of the December 20, 1963 decision *are identical, word for word, with the unsigned prepared written decision which accompanied the file back to Phoenix on April 19, 1963, and which had apparently been prepared in accordance with the Robert A. Coote memorandum of August 13, 1962.* (See Exhibit Fifteen attached to Appellants' motion for summary judgment (R. 122)).



Four months after this decision was rendered, a \$9,150.00 check, dated April 6, 1964, was mailed by the Land Office in error to the wrong address of Plaintiffs and was not delivered to Plaintiffs until April 10, 1964, whereupon Plaintiffs did, immediately that same day, hand deliver the Land Office's letter and the check contained therein back to the Land Office informing them that an appeal to the courts would be forthcoming.

It is submitted to the Court that the facts as above recited by Appellants are admitted by Appellees and are the facts of this case.

After the filing of this case in March, 1965, the Appellees responded with a motion for summary judgment (R. 19) which was, in turn, responded to by Appellants by their own opposition to Appellees' motion for summary judgment and Appellants themselves made a motion for summary judgment (R. 36).

After hearing on said motions by the Honorable Walter Craig, an opinion and order was handed down on March 22, 1966 (R. 193).

Appellants then made a motion for reconsideration and without oral argument an order was entered by the District Court denying this motion for reconsideration on May 16, 1966 (R. 221).

In its opinion and order denying Appellants' motion for summary judgment and granting Appellees' motion for summary judgment, the court in part said:

"It is the opinion of this Court that the Secretary had the discretion to accept or reject the offer of the Plaintiff, Lewis, up to the time a cash certificate was actually issued. 43 U.S.C. 1171, 43 C.F.R. 250.5"

The court went on to say:

"The sale held in the local Land Office was, in fact, an auction with reserve, and it has been so held. *Ferry v. Udall* (9 CCA. 1964), 336 F2d. 706, 710, Cert.Den. 85 S.Ct. 1449, following *Willcoxson v. United States* (CCA. D. 1936), 313 F2d. 884."

The court went on to state:

"This court does not find it necessary to examine the finding or concur with the court in *Ferry*, that the Administrative Procedure Act does not require judicial review of the exercise of agency discretion in a case such as this one. Whether there is a binding obligation on the Secretary to sell, is a question of substantive law, and the answer should be the same without regard to whether the relief sought was under the Federal Tort Claims Act, 28 U.S.C. 1346 and 2671 et seq, or under the Administrative Procedure Act, 5 U.S.C. 1001, et seq. *Ferry v. Udall*, *supra*, at page 711; *Willcoxson v. U. S.* *supra*."

Although finding against Appellants, the Court went on to say:

"Notwithstanding the foregoing and the resulting judgment in this matter, it appears to this court that either the statutes or the regulations of the Department are sorely in need of revision. This, in order that citizens of the United States who, in good faith, comply with the many tedious requirements in order to assure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale, are not summarily cast aside by a change in policy or a summary decision to withhold the cash certificate. The remedy for this unhappy situation rests, however, with the Congress of the United States, or the Executive Department, and not with the courts."

#### SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in denying Plaintiffs' motion for summary judgment;
2. The District Court erred in granting the Defendants' motion for summary judgment;
3. The District Court erred in deciding that the Secretary had the discretion to accept or reject the offer of Plaintiffs Lewis up to the time a so-called "cash certificate" was actually issued;
4. The District Court erred in stating the auction was an auction with reserve;

5. The District Court erred in concluding that if it was an auction with reserve, that the reserve had not been met by Plaintiffs.

### QUESTIONS PRESENTED

1. Whether an application to purchase land under Section 7 and 14 of The Taylor Grazing Act (Act of June 28, 1934, c. 865, 48 Stat. 1272, and Act of June 28, 1934, c. 865, 48 Stat. 1274, now appearing as 43 U.S.C. 315 (f) and 43 U.S.C. 1171), has any rights prior to the issuance of a cash certificate.

2. Whether or not disposal, as distinguished from classification of lands under the cash entry system of The Taylor Grazing Act, specifically Sections 7 and 14 of said Act, are so committed to agency discretion as not to be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, c. 324, 60 Stat. 243, which now appears as 5 U.S.C. 1009).

3. Whether or not the acts of the Secretary in exercising his discretion were based on considerations outside the law and therefore reviewable under Section 10 of The Administrative Procedure Act and whether or not the actions of the Secretary of the Interior and the Department of the Interior were so outside the law as to be reviewable by the courts, regardless of the finality of the Secretary's discretion, and,

4. Whether or not, in a sale of land under Sections 7 and 14 of The Taylor Grazing Act, the reserve specified in the auction is the actual issuance of a paper known as a cash certificate, stating that certain acts have been done, or the actual doing of said acts, regardless of whether or not a paper reciting that they had been done is issued by the Department.

5. Whether or not the constitutional rights of the Appellants Lewis were violated by the Department of the Interior in that the press release admitted by Appellees as being true, amounted

to an imposition of sanctions and pains and penalties and, in essence, an attainder against the Appellants in that such press releases and policies pursuant thereto, by the Department of the Interior, classified Appellants into members of a group deserving of sanction and because of having so classified them then proceeded to inflict punishment upon them without judicial trial.

### SUMMARY OF ARGUMENT

1. As to the first question presented, it is the position of Appellants that under the posposal section of The Taylor Grazing Act, a right does exist, to-wit: the right to enter. This is a Constitutional right which cannot be interfered with without due process of law. To allow the Secretary or any administrative agency to do away with the statutory right without some form of review for arbitrariness, or unreasonableness, is a violation of a constitutional right. In this regard, it is to be pointed out that the case of *Ferry v. Udall* (9 C.C.A. 1964), 336 F2d. 706, fails to note or even mention Section 7, the classification section of The Taylor Grazing Act, which specifies procedure for the disposal of all lands under The Taylor Grazing Act, including Section 14 of The Taylor Grazing Act, and that in this regard *Ferry v. Udall*, *supra*, was in error.

2. As to the question as to whether or not disposal as distinguished from classification of lands under the cash entry system of The Taylor Grazing Act, specifically Sections 7 and 14 of said Act, is so committed to agency discretion as to not be reviewable under Section 10 of The Administrative Procedure Act (Act of June 11, 1946, C. 324, 60 Stat. 243, which now appears as 5 U.S.C. 1009), it is Appellants' position that, again, the Court in the case of *Ferry v. Udall*, *supra*, confused the classification of what land is suitable for disposal with the procedure after a qualified application has been allowed, and the applicant has a preference right to enter, which is the case at hand. In essence, it is the position of the Appellees that under a single regulation, 43 C.F.R. 250.5, which says that any time



prior to the issuance of a cash certificate, the authorized officer may determine that the lands should not be sold, gives him the right to make such a determination, arbitrarily, without good reason or cause, and thus deny the applicants preference right to enter under the statute. That such a position ignores the provisions of 43 C.F.R. 250.11 and 43 C.F.R. 250.12, which imposes upon the Secretary of the Interior and the Department certain actions have been taken, and ignores the rights given under Section 7 of The Taylor Grazing Act. In this regard, it should be pointed out that courts are exceedingly slow to rule that a statute precludes all judicial review.<sup>4</sup> The legislative attempt to forbid judicial review, must be clear and convincing and unmistakable.<sup>5</sup>

3. It also is the position of defendants that the facts at hand differ from other cases presented to this Court at previous times in these matters. That the acts of the Department of the Interior (and the Secretary of the Interior) in exercising its discretion, were based on considerations outside of the law, and therefore reviewable under Section 10 of The Administrative Procedure Act.<sup>6</sup> That from the facts of this case, after casting aside all

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<sup>4</sup>Guardian Life Insurance Co., v. Bohlinger, 308 NY. 174, 124 NE2d. 110. Rehearing denied, 308 NY.810, 125 NE2d. 876; Airline Dispatchers Association v. National Mediation Board, 89 App. D.C., 24, 189 F2d.685. Certiorari denied, 342 U.S. 849, 96 L. Ed. 641, 72 S. Ct. 77.

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<sup>5</sup>Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946) "To preclude judicial review under this Bill, a statute, if not specific in withholding review, must upon its face give clear and convincing evidence of intent to withhold it."

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<sup>6</sup>Section 10 of The Administrative Procedure Act, 5 U.S.C. 1009, which says in part: "Scope of Review—So far as necessary to a decision, where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of an agency action. It shall . . . (b) hold unlawful and set aside agency actions, findings and conclusions found to be (1) *arbitrary, capricious and an abuse of discretion*, or otherwise *not in accordance with law*; . . ." (Emphasis supplied)

webs of legalistic intricacies, it is quite apparent that the actions of the Department of the Interior were not based upon the statutes, or the regulations, but upon pure press release policy and unilateral declarations, and therefore, outside the law. It is also the position of the Appellants that the procedure used by the Secretary, regardless of its being based upon law or retroactive press releases, was completely outside the law and the regulations, was secretive and was based on intricate departmental memorandums not shown to Appellants and therefore contrary to the regulations.<sup>7</sup>

4. As to question number four, it is Appellants' position that if this Court finds that a public sale under Section 14 of The Taylor Grazing Act is an auction, as stated by this Court in the case of *Ferry v. Udall*, *supra*, that said reserve is not the issuing of a cash certificate reciting that certain acts have been done, which is, in effect, a departmental memorandum, but is the actual doing of said acts, regardless of whether or not such memorandum has been issued, and that once said acts are performed the reserve has been met.

5. In regards to question number five, the facts as admitted by Appellees by reason of their motion for summary judgment and failure to object to the facts as set forth by Plaintiffs in their motion for summary judgment, or to controvert them by affidavit or otherwise, shows quite conclusively that one of the basic reasons for Appellants not being issued a cash certificate and subsequent patent was based upon the classification of Appellants as speculators and therefore was in direct violation of the recent Supreme Court decision of *U.S. v. Archie Brown*, 381 U.S. 437 (1965), in that the Department has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, and therefore inflicts punishment upon them without judicial trial, depriving them of the

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<sup>7</sup>43 C.F.R. 221.99 (d)-Basis of decisions; Record. See also current 1966 C.F.R. 1850.0-8 (a) (4).

right which every United States citizen has, of attempting to obtain through public sale, exchange, or otherwise, public lands.

## ARGUMENT

I. An application to purchase land under Sections 7 and 14 of The Taylor Grazing Act<sup>8</sup> has rights under the statutes and regulations prior to the issuance of a cash certificate. In arguing this point, Appellants must face head-on *Ferry v. Udall, supra*, and *Willcoxon v. United States* (CCA. DC. 1963), 313 F2d. 884. It is Appellants' contention that the lower court was incorrect in citing *Willcoxon v. U.S., supra*, since it is quite apparent from the facts of that case that the Secretary was not exercising any discretion so vested in him at that stage of the proceedings; he had already exercised his discretion. He was exercising his judicial authority under the last sentence of 43 CFR 250.5 to determine the lawfulness of disposition of land which was unlawful at that time, because it was found to be valuable for uranium, a fissionable material, a fact which clearly vitiates the sale under the Land Disposal Laws.<sup>9</sup>

Also, *Ferry v. Udall, supra*, Appellants feel was in error. However, it also differs from the Plaintiffs' case at hand. Among these distinctions are: (1) in the case at hand, the Secretary's decision of December 20, 1963, injected into Appellants' case a matter of price, when that issue had not been the basis for the local Land Office's prior decision, nor the basis of the Director's affirmation thereof. This was not true in *Ferry v. Udall, supra*. (2) The Secretary's finding of December 20, 1963, that the appraisal of June 6, 1959 was a "mistake" on the part of the local Land Office, was not at issue in *Ferry v. Udall, supra*. (3) The Secretary's attempt, by his decision of December 20, 1963, to use his "discretion" some four years and six months after the

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<sup>8</sup>Act of June 28, 1934, C. 865, 48 Stat. 1272, and Act of June 28, 1934, C. 865, 48 Stat. 1274, now appearing as 43 U.S.C. 315 (f) and 43 U.S.C. 1171.

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<sup>9</sup>43 U.S.C. 1171 and 43 U.S.C. 1341 (e)

alleged "mistake", and at that late date correct this "mistake" of the local Land Office, *at the expense of Plaintiff*, thereby denying them a right conferred on them by law, also was not the case in *Ferry v. Udall, supra*. (4) In the case at hand, the classification of Appellants as speculator, and branding them as such appears to be the main determinative factor for the action of the Department. Such was not so in *Ferry v. Udall, supra*. Also, the circumstances of the pre-written, unsigned decision influencing the subsequent appraisal, was not present in *Ferry v. Udall, supra*.

A careful review of Section 14 of The Taylor Grazing Act, sometimes called the Isolated Tracts Act, shows that it is a part of The Taylor Grazing Act, even though it is found in a different portion of the statute books, having been passed at a later time. Reading of this section will also show that it has no procedure set up for initiating the disposal under that section. The reason for this is that the procedure classifying lands pursuant to application for disposal of the lands by public sale and other public land laws, is already set up in Section 7 of The Taylor Grazing Act (43 U.S.C. 315(f))

Section 7 of The Taylor Grazing Act provides in part as follows:

"... Upon the application of an applicant qualified to make entry, selection or location, under the *Public Land Laws*, and filed in the Land Office of the proper district, the Secretary of the Interior *shall* cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle applicant to a *preference right to enter*, select or locate such land, if open to entry as herein provided." (Emphasis supplied).

NOTE: This Section provides for disposal "under the Public Land Laws", one of which is Section 14 of The Taylor Grazing Act, dealing with sales at public auction. This is a point which was never mentioned by the Court in *Ferry v. Udall, supra*, but all of the applications for disposing of land heretofore by the Department of the Interior, not only for disposals under The Taylor Grazing Act, but also under other land laws, have been



processed under Section 7, including those under Section 14, the public auction sale disposal section of The Taylor Grazing Act.

Under this procedural Section 7 of The Taylor Grazing Act, certain rights are granted to the applicant. Once his application is made, "the Secretary of the Interior *shall* cause" the tract to be classified. Therefore, the first procedure of the Secretary upon application is to classify the land as suitable for sale or not suitable for sale. This is a matter which is left solely to the Secretary's discretion. If he decides not to classify the land for sale, his discretion is not reviewable. However, the statute goes on to point out that once the classification is made, that is, "if allowed by the Secretary of the Interior", such allowed application *'shall* entitle the applicant to a preference right to enter". What is meant by this terminology?

In essence, once the land has been classified as suitable for sale by the Secretary, the applicant has a "preference right to enter". The word "entry", as used in the Public Land Laws, covers all methods by which a "*right to acquire title*" to public lands may be initiated.<sup>10</sup>

According to the Glossary of Public Land Terms, put out by the Department of the Interior, an entry is defined as follows:

"In general, an allowed application which was submitted by an applicant who *will* acquire title to the land by *payment of cash*, or its equivalent, and/or by entering upon and improving the land."<sup>11</sup>

Therefore, this "preference right to enter"<sup>12</sup> is a preference right to "acquire title to the land by payment of cash or its equivalent".<sup>13</sup>

Since this is a right granted by the statutes and the regulations,

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<sup>10</sup>Black's Law Dictionary, 4th Edition, Page 627.

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<sup>11</sup>Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

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<sup>12</sup>Section 7, The Taylor Grazing Act, 43 U.S.C. 315 (f).

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<sup>13</sup>Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

can the pursuit of this right be denied by the Secretary by arbitrary action on his behalf, or without reason?

It was the position of the Secretary, and the court in *Ferry v. Udall, supra*, that this right could be denied. The argument was that the Isolated Tracts Act<sup>14</sup> did not specify the procedure to be followed in selling said tracts. This position was adopted by the court in the *Ferry v. Udall, supra*, and was erroneous.

The adoption of this argument by the court in the *Ferry v. Udall, supra*, completely ignored the fact that the Isolated Tracts Act is an integral part of The Taylor Grazing Act. In fact, the main purpose of Section 14, which was a last minute amendment by the Senate to The Taylor Grazing Act, is to allow the Secretary to sell at public auction certain lands not exceeding 1,520 acres, which, in his judgment, would be proper to expose for sale.<sup>15</sup>

In reaching its conclusion, this honorable court, in the case of *Ferry v. Udall, supra*, relied heavily upon one particular regulation of the Secretary.<sup>16</sup>

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<sup>14</sup>Section 14, The Taylor Grazing Act, 43 U.S.C. 1171.

<sup>15</sup>Section 14, The Taylor Grazing Act, 43 U.S.C. 1171, U.S. Code, Congressional Service, 80th Congress, 1st Session, 1946, page 1510: "There are tracts of public lands of over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them. The Interior Department advises there is no use holding them for homesteaders because, if they had been suitable, they would have been homesteaded years ago, and, being isolated, they often are not so situated that they can be included in the land program."

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<sup>16</sup>43 C.F.R. 250.5

"Effect of Application. The filing of an application in conformity with the regulations of this part, will not segregate the lands applied for from any other application under the Public Land Laws, or defeat a prior valid right initiated under such law. However, until the issuance of a cash certificate, the authorized officer may, at any time, determine that the land should not be sold, the applicant or any bidder has no contractual or other right, as against the United States, and no action taken will create any contractual or other obligation of the United States."

The court, in *Ferry v. Udall*, *supra*, stated that this regulation allowed the authorized officer, at any time before the cash certificate is issued, to determine *for any reason he sees fit*, that the land should not be sold and that this determination is not subject to review by the courts.

Such an interpretation effectively nullifies the meaning of a "preference right to enter" given by Section 7 of The Taylor Grazing Act<sup>17</sup> Further, it nullifies the meaning of other regulations under this same section.<sup>18</sup>

These regulations are quite specific in stating what rights accrue to a proper applicant and what the Secretary should do as a mechanical procedure of the sale after the land has been classified as suitable for sale by the Department of the Interior. For example, 43 C.F.R. 250.11 says in part:

"(a) Declaration of High Bidder.

"When all persons present shall have ceased bidding, the Manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchasers or owners of contiguous land . . . announce the amount of the highest bid and declare the offeror thereof . . . *the highest bidder*, provided that the buyer immediately pays to the Manager the amount of the bid, if he has not already done so. . . ."

"(f) If, by the end of the preference right period, no preference right has been asserted, *the sale will be declared closed* and the Manager may declare the highest bidder the *purchaser*." (Emphasis supplied).

Regulation 43 C.F.R. 250.12 (c) states in part as follows:

"When there has been full compliance with the regulations on his part, the Manager *will* issue a cash certificate to the purchaser." (Emphasis supplied).

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<sup>17</sup>43 U.S.C. 315 (f); Black's Law Dictionary, 4th Edition, page 627; Glossary of Public Land Terms, 1949, USDI, BLM, page 3.

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<sup>18</sup>43 CFR. 250.11; 43 CFR.250.12 (c).

Keeping in mind the "preference right to enter",<sup>19</sup> granted by statute, together with the Secretary's own regulations,<sup>20</sup> as quoted above, there would appear to be only one logical interpretation of 43 C.F.R. 250.5, and that interpretation is contrary to that of this court in *Ferry v. Udall*, *supra*.

This regulation, 43 C.F.R. 250.5, allows the authorized officer, at any time prior to the issuance of a cash certificate, to "determine that the land should not be sold".

The question is, in the light of the statutes and regulations, *on what basis may this determination be made?*

By making such determination, the authorized officer is acting in a judicial capacity. Courts may make determinations in determining matters, but not for any reason they deem fit. Their determination must be based on some sound reasoning and must be based upon proper procedure. What the Government is saying is that the authorized officer, under this regulation, can ignore the fact that he *will* issue a cash certificate if certain things are done, and that the sale *will* be closed, and that the highest bidder *will* be declared the purchaser after certain acts have been performed, merely because, quite literally, the officer involved does not like the color of the applicant's hair or some other reason just as ludicrous.<sup>21</sup>

he only logical construction of 43 C.F.R. 250.5 is that the authorized officer may "determine" that the land will not be sold for failure of proper performance of conditions subsequent under the regulations, such as is contained in 43 C.F.R. 250.12, or because of fraud or mutual mistake, or because the land is found to be mineral in character, such as the fissionable uranium discovered in *Willcoxon v. U.S.*, *supra*, or for some other lawful

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<sup>19</sup>Section 7, The Taylor Grazing Act; 43 U.S.C. 315 (f).

<sup>20</sup>43 CFR. 250.11; 43 CFR. 250.12 (c).

<sup>21</sup>43 CFR.250.11; 43 CFR. 250.12.



reason; *not merely for any reason whatsoever*. To hold otherwise would be to say that the authorized officer may determine that the land should not be sold for any reason he sees fit, something which is not indicated by the regulations, and such a construction completely nullifies the purpose and intent of 43 C.F.R. 250.11 and 43 C.F.R. 250.12, and makes the mandatory language contained in these regulations completely ludicrous.

In essence, in *Ferry v. Udall, supra*, the Court is saying that the mandatory language contained in the above cited regulations and in Sections 7 and 14 of The Taylor Grazing Act, are as dead and unnecessary as the words contained in a Constitution of a government ruled by a dictatorship, and that the words stating that certain things shall follow certain events may be disregarded at any time because of the wording of one regulation giving absolute unbridled and unreviewable power to the appointive head of a department under the Executive Branch of the Government.

II. The determinations of the Secretary and his authorized officers are reviewable under The Administrative Procedure Act.

This question was touched upon by Appellants in the arguments of the last point, however, it requires special consideration because it is quite apparent that in *Ferry v. Udall, supra*, there was a confusion by the court as to what acts of the Secretary were reviewable.

Section 10 of The Administrative Procedure Act prohibits judicial review of agency action by law committed to agency discretion,<sup>22</sup> but goes on to say in the same section as follows:

"Scope of Review—So far as necessary to a decision where presented, the reviewing court shall decide all relevant questions of law, and interpret constitutional statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall . . . (B) hold unlawful and set aside agency action, findings and conclusions found to be (1)

<sup>22</sup>5 U.S.C. 1009.

arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law; . . ."

It was the erroneous position of this court in *Ferry v. Udall*, *supra*, that the acts of the Secretary and his authorized officers were not subject to judicial review where a sale of public land was concerned, under Section 14 of The Taylor Grazing Act, dealing with the sale of isolated tracts at public sale.

In reaching this result, the lower court decided that the Secretary's decision was so committed to his discretion that it was not reviewable.<sup>23</sup>

In *Ferry v. Udall*, *supra*, the court relied heavily upon, and quoted from: *Panama Canal Company v. Grace Lines Inc.* 356 U.S. 309, which was a case where the court decided it would not review toll rates set by the Panama Canal Company because toll rate adjustments were a matter left to the discretion of the company. It was determined by the court in that case that the decisional process was committed to the company's discretion because it involved ". . . matter upon which experts may disagree; they involve *nice issues* of judgment or choice, which require the exercise of informed discretion."<sup>24</sup> (Emphasis added).

In *Ferry v. Udall*, *supra*, after citing from *Panama Canal Company v. Grace Lines Inc.*, *supra*, the court went on to say that this rule applied to *Ferry v. Udall*, *supra*, and said:

"Similarly, a decision of whether or not it would be in keeping with sound policy *to sell* a particular parcel of land at a certain offered price involves the exercise of informed discretion."<sup>25</sup> (Emphasis supplied).

It is quite apparent that from this language the court in *Ferry v. Udall*, *supra*, is confusing *the classification of what land is suitable for disposal with the procedure after a qualified applica-*

<sup>23</sup>*Ferry v. Udall*, (9 CCA. 1964), 336 F2d. 706, 710. *Certiorari* denied, 85 S.Ct. 1449.

<sup>24</sup>*Panama Canal Company v. Grace Lines Inc.*, 356 U.S. 309.

<sup>25</sup>*Ferry v. Udall*, *supra*.

*tion has been allowed*, and the applicant has a preference right to enter, which is the case at hand.

There is no doubt that whether or not land is suitable for sale, involves *nice issues* of judgment and choices which require the exercise of informed discretion. But it is extremely doubtful and even dangerous to say that procedure to be carried on *after this determination has been made*, involves *nice issues*. Is the Secretary or his authorized officer determining "nice issues" when he refuses to give a notice or hearing as to reappraisals made years after initial appraisal for sale of the land? Is he determining "nice issues" when he unilaterally determines that he made a bad bargain by the initial sale? Is he determining "nice issues" when he arbitrarily refuses to recognize a previous order of his authorized officer, approving the land for sale, merely because of press release policies which were released subsequent to that order? Is he determining "nice issues" when he determines whether or not conditions subsequent to the sale, as provided in the regulations, have been performed?<sup>26</sup>

The courts are exceedingly slow to rule that a statute precludes all judicial review.<sup>27</sup> The legislative intent to forbid judicial review must be clear, convincing and unmistakeable.<sup>28</sup>

Are we to say that under a single regulation which says that at any time prior to the issuance of a cash certificate, the author-

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<sup>26</sup>43 C.F.R. 250.11; 43 C.F.R. 250.12.

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<sup>27</sup>Guardian Life Insurance Co. v. Bohlinger, 308 N.Y.174, 124 NE2d.110. Rehearing denied, 308 NY. 810, 125 NE2d.876; Airline Dispatchers Association v. National Mediation Board, 89 App.D.C.24, 189 F2d.685 Certiorari denied, 342 U.S. 849, 96 L.Ed.641, 72 S. Ct.77.

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<sup>28</sup>Senate Document 248, 79th Congress, 2nd Session, 229 at 275 (1946)  
 "To preclude judicial review under this Bill, a statute, if not specific in withholding review, must, upon its face, give clear and convincing evidence of intent to withhold it."

ized officer may "determine" that the land should not be sold,<sup>29</sup> gives him the right to make such a determination, arbitrarily, without good reason or cause, and thus to deny the applicants preference right to enter under the statute?<sup>30</sup>

Where rights are involved, there should be no arbitrary denial of such rights. The term "entry" in the technical sense, means that act by which an individual acquires an *inceptive right* to a portion of the unappropriated soil of the country by filing his claim.<sup>31</sup>

An "inceptive right" is an inchoative right.<sup>32</sup> This is to say that the applicant has a legal right not yet perfected but a right nevertheless.

The right to enter public lands, when granted by statute, is one of the constitutional privileges of citizenship.<sup>33</sup>

Section 7 of The Taylor Grazing Act<sup>34</sup> gives the statutory right to an applicant whose application has been approved by the Land Office. This inchoate right, which is a constitutional right, should not be denied by arbitrary action of the Secretary, and such action should be reviewable.

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<sup>29</sup>43 C.F.R. 250.5

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<sup>30</sup>Section 7, The Taylor Grazing Act; 43 U.S.C. 315 (f).

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<sup>31</sup>73 C.J.S. Public Lands, Section 36, page 685.

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<sup>32</sup>Webster's Third New International Dictionary, Unabridged Edition, page 1141.

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<sup>33</sup>43 Am.Jur., Public Lands, Section 20, page 799; 16 Am.Jur.2d, Section 483, page 842; *Twining v. N.J.*, 211 U.S. 78, 53 L.Ed.97, 29 S.Ct.14; *U.S. v. Waddell*, 112 U.S. 76, 28 L.Ed. 673, 5S.Ct. 35.

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<sup>34</sup>43 U.S.C. 315 (f).



But, again, it is said by the court in *Ferry v. Udall*, *supra*, that the wording of 43 C.F.R. 250.5 puts all procedures for sale of land under Section 14 of The Taylor Grazing Act, entirely in the Secretary's unreviewable discretion.<sup>35</sup>

However, this is just not so. The Supreme Court of the United States said, in an exchange lieu selection case, *Payne v. New Mexico* (1921) 255 U.S. 367, set forth what the import of language similar to that contained in 43 C.F.R. 250.5 was, in so far as its application was concerned to Public Land Laws. The court said as follows:

"But it is said that as the selection is 'subject to the approval of the Secretary of the Interior' no right can become vested, nor equitable title be acquired, unless and until his approval is had and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the Secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected, and of approving or rejecting the selection accordingly. The power conferred is 'judicial in nature' and not only involves the authority, but implies the duties 'to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.' (omitting citations). This view of it has been enforced where the Secretary misconceiving his authority and the right of the selector, erroneously declines to approve and cancel selections lawfully made. (omitting citations). And it should be observed that this view has been recognized and applied by the Land Department, although not with uniformity."

This case, which is generally discussing all land laws, makes the point that even though there are provisions under land laws which say that the Secretary's discretion is unbridled as to vest or not to vest title, subject to his approval, this is not an uncommon

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<sup>35</sup>*Ferry v. Udall*, *supra*.

provision under our land laws. Again, for emphasis, as the court said, "The words relied upon are not peculiar to this land grant but are found in many others," and goes on to say that the power is "judicial in its nature" and implies the "duty to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the selections."<sup>36</sup>

In the case at hand, the District Court cited the *Yosemite Valley case*, 82 U.S. 77, as it was cited in the case of *Willcoxon vs. U.S.* (CCA.DC. 1963), 313 F.2d. 884. Appellants find this to be a case furthering their position, rather than against them. Bear in mind that the facts are admitted, that Appellants had fully complied, by January 25, 1960, with all the requirements of the law and the regulations of 43 C.F.R., particularly sections 250.11 and 250.12; they had paid the price, received a cash receipt, and were fully entitled to a so-called "certificate" under 43 C.F.R. 250.12 (c) as those regulations direct. Why is this? The *Yosemite Valley case*, *supra*, is one where the entryman had merely filed. His entry had not been approved, nor had he complied fully with the requirements of the regulations. Upon this basis his claim was rejected, yet, in this case we find Mr. Justice Fields, in delivering the opinion of the Supreme Court of the United States, using the following language in part on page 87 of this decision:

" . . . The power of regulation and disposition (over the public lands of the United States) conferred upon Congress by the Constitution, *only ceases* when all the preliminary acts prescribed by those laws for the acquisition of title, including the payment of price of the land, have been performed by the settlor. *When these prerequisites have been complied with, the settlor, for the first time, acquires a vested interest in the premises . . . of which he cannot be subsequently deprived. He is then entitled to a certificate of entry from the local Land Office and ultimately to a patent to the land from the United States.*" (Emphases supplied)

It can be seen clearly from this case that under our circum-

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<sup>36</sup>*Payne v. New Mexico*, *supra*.

stances, Plaintiffs (1) had an "interest in the premises" and (2) were "then entitled to a certificate of entry from the local Land Office" and, finally, (3) entitled "ultimately to a patent to the land from the United States."

In support of the same proposition, see also *Frisbie v. Whitney*, 9 Wall. 187, 19 L.Ed. 668; and *Little v. Arkansas*, 9 Howe 333; and *Bernard v. Ashley*, 18 Howe 43, 15 L.Ed. 285; and *U.S. v. Fitzgerald*, 15 Pet. 407, 18 Howe 483, 15 L.Ed. 285; 9 Pet. 133; 10 Pet. 330; 2 Pet. 659.

Further, in *Wyoming v. United States*, 255 U.S. 489 (1921), we find the Supreme Court of the United States saying:

"... That whenever in cash sales the price has been paid, or, in other cases, all the conditions of the purchase have been performed, the full equitable title has passed, and only the naked legal title remains in the Government in trust for the other party, in whom are vested all the rights and obligations of ownership."

In support of this position, see also *Colorado Coal and Iron Company v. United States*, 123 U.S. 307; and *United States v. Iron Silver Mining Company*, 128 U.S. 673; and *Shaw v. Kellogg*, 170 U.S. 312.

Therefore, it is the position of the Appellants that once they have performed all of the acts necessary to be entitled to a patent, which is admitted, they were entitled to a patent. However, it is the Government's position that merely because an instrument called by them a "cash certificate" was not issued, reciting that the acts had been done, that they had the right, in their unbridled discretion to change the results. As pointed out before, the cash certificate is nothing but an inter-office memorandum reciting that certain acts have been done. The question might reasonably be asked: What is the substance of this situation? Is it the issuing of a document which recites that acts have been done? Or the actual doing of the acts themselves?

It can be seen by the above that once the classification procedure of the Secretary, which is within his absolute discretion,

has been passed, this absolute and unreviewable discretion ceases, rights accrue to the applicant whose application has been approved, and, therefore, the ultimate disposal after the initial proceedings are reviewable under Section 10 of The Administrative Procedure Act in the event that the Department of the Interior's actions are found to be ". . . arbitrary, capricious and an abuse of discretion, or otherwise not in accordance with law. . . ." <sup>37</sup>

III. The acts of the Secretary in exercising his discretion were based on considerations outside the law, were arbitrary, capricious and an abuse of discretion, and therefore reviewable under Section 10 of The Administrative Procedure Act. Keeping in mind that the facts as set forth in Appellants' motion for summary judgment, which are substantially the same as those set forth in this brief, were deemed admitted by the Government by reason of its failure to controvert any of said facts, it is quite apparent that the ultimate decision of the Secretary were based on the following considerations:

(1) Press release policies which were not even in the form of regulations;

(2) Classifying the Appellants as speculators and therefore as citizens persona non grata under the press release policies, and therefore not entitled to acquire public land as long as they remained in said category as unilaterally determined by the Secretary pursuant to his press release policies;

(3) A subsequent reappraisal of the value of the land at the time of bidding, over four years after the bidding had taken place, after the file had been returned to the Phoenix Land Office with, in essence, directions by letter and by an unsigned decision as to what the appraisal should be.

In this regard it is interesting to note the language of the lower court in its decision on the last page thereof (R. 195), which reads as follows:

"Notwithstanding the foregoing, and the resulting judg-

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<sup>37</sup>5 U.S.C. 1009.



ment in this matter, it appears to this court that either the statutes or the regulations of the Department are sorely in need of revision. This, in order that citizens of the United States who, in good faith, comply with the many tedious requirements in order to assure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale are not summarily cast aside *by a change in policy* or a summary decision to withhold the cash certificate." (Emphasis supplied).

We disagree with the lower court, that this is a matter which necessarily requires a change in the statutes and regulations, but say that it is a matter which can be reviewed by this court. We wholeheartedly agree with the court where it, in essence, finds that the Appellants were "summarily cast aside by a change in policy" and for that matter, a policy set by press releases.

Since it is quite apparent that the Appellees made their decision in this matter based upon the above considerations, said considerations were certainly outside of the law.

Certainly, the power and authority vested in the Appellees in land disposal cases by words such as the last sentence of 43 C.F.R. 250.5, has been held by the Supreme Court of the United States to be "judicial in nature" and "involves the duty to determine the lawfulness of the disposal."<sup>38</sup>

As was said in *Weyerhouser v. Hoyt*, 219 U.S. 380, 388, 31 S. Ct. 300, 55 L. Ed. 258:

"The jurisdiction and power of *disposition* (as distinguished from classification) of public lands by the Land Department is not arbitrary or discretionary, but subject and must be exercised in accordance with the law, and any disregard of the law by the Land Department is remedial in the courts."

The question may be asked: May the Appellees, or the courts, in interpreting Plaintiffs' rights under the law in this subject case,

<sup>38</sup>Payne v. New Mexico, (1921) 255 U.S. 367; *Weyerhouser v. Hoyt*, 219 U.S. 380, 31 S.Ct. 300, 55 L.Ed. 258; *Daniels v. Wagner*, 237 U.S. 547, 35 S.Ct. 740, 59 L.Ed. 1102, L.R.A. 1916A, 1116, and cases 1917A, 40; *Payne v. Central Pacific Railroad Co.* 255 U.S. 228, 41 S.Ct. 314, 65 L.Ed. 683.

"disregard" all of the other regulations, including 43 C.F.R. 250.11 and 150.12, and interpret Plaintiffs' rights, as this court has done, by its opinion? Did Congress, in passing The Taylor Grazing Act, and the Appellees and their predecessors in passing the numerous regulations pursuant thereto, intend as follows: "Citizens of the United States who, in good faith, comply with the many tedious requirements in order to assure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noticed for sale, (may) be summarily cost aside by a change in policy or a decision to withhold the cash certificate . . ."?<sup>39</sup>

At least in the *Willcox* case, *supra*, the decision not to sell was based upon lawful procedure, to-wit: discovering that the lands were substantially valuable for mineral and the land could not be sold by reason of The Fissionable Materials Act.<sup>40</sup> The facts as admitted by Appellees in the case at hand show that the same is not true in this case. In this case everything necessary under the law and regulations was done except for the issuance of an inter-office memorandum saying they had been done. The admitted facts show that the actual rejection was based upon considerations completely outside any law or statute, as much so as if the Secretary decided he did not like the color of the applicant's hair. Is such justified merely because a memorandum entitled a "cash certificate" was not issued?

When such a decision is based upon press release "anti-speculation" policies and not even regulations, is such a determination lawful? Was the application of these anti-speculation policies in a retroactive way lawful? Is there anything in The Taylor Grazing Act, as amended June 28, 1934, which limits the number of purchases by citizens at a public auction sale? Is there anything in The Taylor Grazing Act which prohibits what the Government considers to be "speculation" in the purchase of

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<sup>39</sup>Opinion Order, Number CIV-5451, PHX., page 3 (R. 195).

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<sup>40</sup>43 USC 1391 (e)

public lands at public auction sales held under the authority of the statutes which are under scrutiny here?

The answer to all these questions is "No."

In the case of *Mason*, A-26176, 61 ID. 25, it was held by the Secretary of the Interior himself, that under these statutes the person is perfectly entitled to purchase adjoining lands for the sole purpose of becoming a preference right purchaser. See also *Mason v. Mason*, 3 *Utah*. 2d.222, 282 *Pac.* 2d.317

IV. The reserve specified in the auction or public sale under Sections 7 and 14 of The Taylor Grazing Act is not the actual issuance of a paper known as a cash certificate, stating that certain act have been done, but the actual doing of said acts, regardless of whether or not a paper reciting that they have been done is issued by the Department.

In *Ferry v. Udall*, *supra*, this court held that the reserve in the auction was set out in the regulations, 43 C.F.R. 250.5 and that therefore the Secretary could revoke the sale at any time until the cash certificate was issued. This, the court held, regardless of the provisions as heretofore cited of 43 C.F.R. 250.11 and 43 C.F.R. 250.12, stating that upon the completion of certain acts, the Secretary will issue a cash certificate.

A copy of this so-called "certificate" is attached to Appellants' motion for summary judgment as Exhibit "B". It might be pointed out that this is nothing more than an inter-office memorandum in the Land Department which states that certain acts have been done. The question should be asked of this court: What is the substance of the matter? What is important? Is it the doing of the acts or merely a memorandum which signifies that they have been done, which is a condition of the auction?

See also a copy of the notice of sale as it existed at the time of the auction sale of Plaintiffs' land, Exhibit "D" attached to Appellants' motion for summary judgment. Compare it also with the notices now put out by the Land Department and you will see that they specifically, on their notice, make reservation at

the present time, which they did not at the time of this subject sale (See Exhibit "E" attached to Appellants' motion for summary judgment).

In Appellants' case, everything necessary under the law and regulations was done and is so admitted by Appellees except for the issuance of this inter-office memorandum saying they had been done. Is the sale to be thwarted by the failure of this memorandum? Is the physical act of setting down on paper that certain acts have been done the "reserve" in this auction? Or are the acts themselves the "reserve"? It is shown that the acts were done and this is admitted by the Government.

Such an absurdity has been rejected by the United States Supreme Court. In the case of *Daniels v. Wagner*,<sup>41</sup> it was pointed out that the substance of the law is what should be followed and this law was as follows:

"This brings us to determine whether the Land Department had the right to reject a prior lieu land entry or entries and award the land to subsequent and subordinate applicants under the assumption that it possessed a discretionary right to do so, . . . an authority the possession of which was sustained by both courts below."

"In primarily testing the proposition from the point of view of principle, it is well at once to exactly fix its true importance. In doing so, it is to be conceded (a) that the Act of Congress gave the right to one whose land had come to be included by operation of law in a forest or other reservation, to apply to the Land Office and obtain the right to enter an equal amount of public land upon the surrender to the United States of the land situated in the reservation, and upon the doing and offering to do everything required by the law or the lawful regulations of the Land Department to be done or offered to be done for that purpose; (b) that in the particular case the application to enter the lieu land came within the grant of the statute, and all that was required by

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<sup>41</sup>*Daniels v. Wagner*, 237 U.S. 547, 557, et seq., 35 S.Ct. 740, 59 L.Ed. 1102, LRA. 1916A, 1116, and case 1917A, 40.



law or lawful regulation was done by the applicant in order to obtain entry; and (c) that it was the plain duty of the proper authorities of the Department on the filing of the entry indue course under the law to grant it. When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where, under an Act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain and fix the terms and conditions upon which the people may enjoy the right to purchase, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed, it becomes unnecessary to go further to demonstrate its *want of foundation*." (Emphasis supplied).

V. The constitutional right of the Appellants were violated by the Department of the Interior in that press release (admitted by Appellees as being true) amounted to an imposition of sanctions and pains and penalties and, in essence, an attainder against Appellants in that such press release and policies pursuant thereto, by the Department of the Interior, classified Appellants into members of a group against whom sanctions were taken and because of having been so classified, the Department then proceeded to inflict punishment upon Appellants without judicial trial.

The press release and classification of speculators as a class of people to whom which land would not be sold, amounted to an imposition of sanctions and pains and penalties against Appellants since they were so classified as is illustrated by the affidavits and exhibits attached to Appellants' memorandum for

summary judgment which is part of the record herein. By classifying Appellants as speculators and because this was apparently one of the prime reasons why the sale was turned down, such amounted to the invoking and use by the Department of the Interior in a like manner of a bill of attainder which interferes with a constitutional right, which was the right heretofore referred to as the right to enter public land under the laws and regulations.<sup>42</sup>

In *U.S. v. Archie Brown*,<sup>43</sup> *supra*, the Supreme Court of the United States said:

"The rights of attainder is that legislature (in our case it would be the administrative department as set up by the Legislature) has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction. . . ." The court in that case went on to say:

"Legislative Acts (in our subject case, administrative acts), no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without judicial trial, are bills of attainder and are prohibited by the Constitution."

It is well to remember the words of the Supreme Court in *Little et al v. State of Arkansas et al*, 9 *Howe* 314, 333; 13 *L.Ed.* 153, which are:

"It is a well-established principle that where an individual in the prosecution of a right, does everything which the law requires him to do, and he fails to obtain this right by the misconduct and neglect of the proper office, the law will protect him."

In this case it is quite apparent that the Lewises had a right to enter and obtain the land under the law previously cited. This right was denied to them by being classified as "speculators" by a qualified legislative act of the Department in issuing new press release policies.

<sup>42</sup>Section 7, The Taylor Grazing Act; 43 C.F.R. 250. 11 and 43 C.F.R. 250.12; 43 U.S.C. 315 (f).

<sup>43</sup>*U.S. v. Archie Brown*, 399 — October term, 1964 (June 7, 1965); U.S. Reports, Vol. 381, pages 437-478.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's order granting Appellees' motion for summary judgment and denying Appellants' motion for summary judgment be reversed, and the cause be remanded with instructions to enter an order granting Appellants' motion for summary judgment and denying Appellees' motion for summary judgment.

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By: \_\_\_\_\_

  
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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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PERLEY M. LEWIS, ET UX., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE  
INTERIOR, ET AL., APPELLEES

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

---

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE  
INTERIOR, ET AL., APPELLEES

---

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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No. 21167

PERLEY M. LEWIS, ET UX., APPELLANTS

v.

STEWART L. UDALL, SECRETARY OF THE  
INTERIOR, ET AL., APPELLEES

---

APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

---

BRIEF FOR STEWART L. UDALL, SECRETARY OF THE  
INTERIOR, ET AL., APPELLEES

---

OPINION BELOW

The unreported opinion and order of the district court are set forth at pages 193-196 of the record.

JURISDICTION

This case was instituted under the alleged jurisdiction of the Administrative Procedure Act, 5 U.S.C. sec. 1009, and 28 U.S.C. sec. 1361, as amended, Act of October 5, 1962, 76 Stat. 744, against local officials of the Department of the

Interior (R. 1). Appellants sought judgment declaring that the decisions were null and void and directing the appellees to issue to the appellants a cash certificate and a fee patent to the described land. Appellees deny the jurisdiction of the district court to grant any of the relief sought.

Summary judgment adverse to appellants was entered by the district court on March 23, 1966 (R. 193-196). Timely notice of appeal was filed on May 19, 1966 (R. 217). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

#### QUESTIONS PRESENTED

1. Whether this Court's decision in Ferry v. Udall governs the issues in this case.

2. Whether appellants make any showing that Ferry v. Udall is wrong.

#### STATUTES AND REGULATIONS INVOLVED

Section 2455, Revised Statutes, as amended, 43 U.S.C. sec. 1171, Section 14 of the Taylor Grazing Act, referred to herein as the Isolated Tract Act, provides:

Notwithstanding the provisions of section 678 of this title and of sections 212, 321, 662, and 945 of this title, it shall be lawful for the Secretary of the



Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding one thousand five hundred and twenty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: Provided, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: \* \* \*.

Section 2478, Revised Statutes, as amended, 43 U.S.C. sec. 1201, authorizing the Secretary of the Interior to issue appropriate regulations, provides:

The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specially provided for.



48 Stat. 1272, Section 7 of the Taylor Grazing Act,  
43 U.S.C. sec. 315f, reads:

The Secretary of the Interior is hereby authorized, in his discretion, to examine and classify any lands withdrawn or reserved by Executive order of November 26, 1934 (numbered 6910), and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this chapter, or proper for acquisition in satisfaction of any outstanding lien, exchange or script rights or land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws, except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry: \* \* \*.

Among the regulations of the Secretary of the Interior applicable to the present cases is 43 C.F.R. (1954 ed.) sec. 250.5, which provides:

The filing of an application in conformity with the regulations in this part will not segregate the land applied for from other application under the public land laws, or defeat a prior valid right initiated under any such law. However,

until the issuance of a cash certificate, the authorized officer may at any time determine that the lands should not be sold, the applicant or any bidder has no contractual or other rights against the United States, and no action taken will create any contractual or other obligation of the United States. 1/

Further applicable regulations are 43 C.F.R. secs. 250.11(a), 250.11(f) and 250.12(c), which state:

(a) When all persons present shall have ceased bidding, the Manager will, in the usual manner, declare the bidding closed, subject to the preference right of purchasers or owners on contiguous land \* \* \*

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1/ As a result of rearrangement and redesignation in 28 Fed. Reg. 1589, Feb. 20, 1963, 29 Fed. Reg. 4302, March, 1964, and Circ. 2151, 29 Fed. Reg. 10464, July 28, 1964, this regulation is now cited as 43 C.F.R. secs. 2243.1-5.

Though the language and organization of the rule have been changed, today's regulation is essentially the same as 43 C.F.R. sec. 250.5 which was applicable throughout the entire administrative proceedings in this case. It is obvious that the new regulation would have produced the same result. The pertinent part of the new regulation reads

(b) The acceptance of an offer to purchase (bid) will be made by the issuance of a final certificate to the bidder. Until the final certificate is issued the right is preserved to the authorized officer at any time to determine that the sale should not be held, that the lands should not be sold, or that any and all bids should be rejected. \* \* \*

Throughout this brief the former designation [43 C.F.R. sec. 250.5] will be used as this designation is used by appellants and was in effect at the time these legal issues arose.

announce the amount of the highest bid and declare the offeror thereof . . . the highest bidder, provided that the buyer immediately pays to the Manager the amount of the bid, if he has not already done so \* \* \*.

(f) If, by the end of the preference right period, no preference right has been asserted, the sale will be declared closed and the Manager may declare the highest bidder the purchaser.

(c) When there has been full compliance with the regulations in this part, the manager will issue a cash certificate to the purchaser.

#### STATEMENT

On April 25, 1956, an application for the sale of 160.62 acres of land (the property involved in this appeal) was filed in the Phoenix, Arizona, Land Office, Bureau of Land Management, United States Department of the Interior, by Mary T. Rexroat, for the purchase of an isolated tract of public domain land at public auction in conformity with Section 14 of the Taylor Grazing Act, 43 U.S.C. sec. 1171 (R. 3). Thereafter, the land was classified for public sale at a minimum price of \$8,031 (the figure thought to represent the appraised value of the land on July 17, 1959), and auction of the land was held pursuant to the provisions of 43 U.S.C. sec. 1171 and in accordance with 43 C.F.R. sec. 250. On November 3, 1959, said



Mary T. Rexroat was declared the high bidder, offering \$9,150; however, appellants and three other adjoining landowners filed preference claims in accordance with the statute (R. 4,5). On December 4, 1959, the Land Office Manager declared these preference right claimants qualified, each having paid the full bid price of \$9,150. They were given 30 days within which to divide the land. Such an agreement was filed with the Land Office on January 25, 1960 (R. 6).

On June 6, 1960, the Acting Manager of the Land Office vacated the decisions of December 4, 1959, because the subject sale was not in accord with the Department's anti-speculation policy (R. 99). The appellants and Mary E. Ford, another preference right claimant, prosecuted timely appeals to the Director, Bureau of Land Management. The remaining preference right claimants did not appeal and their rights have been closed out by the Department of the Interior.

On October 11, 1960, the Acting Director, Bureau of Land Management, issued a decision affirming the action taken by the Acting Manager. Perley M. and Mildred C. Lewis and Mary E. Ford, Arizona, 023951, 023990 (R. 106-110). He noted that this land came within the Department's anti-speculation policy and emphasized the retrospective application of this

policy and appellants' complete lack of any legal or equitable rights in the land involved. From this affirmance Mary E. Ford did not appeal.

Thereafter, appellants, the only remaining preference right claimants, appealed to the Secretary of the Interior. Pending this appeal, the Bureau of Land Management again appraised the property in order more accurately to determine the value as of November 3, 1959 (the date of the original high bid). This appraisal indicated the 1959 value to be \$30,500, or \$190 per acre, and not \$8,031 as originally reported. On December 30, 1963, the Assistant Secretary of the Interior affirmed the decisions below. Perley M. Lewis and Mildred C. Lewis, A-28707 (R. 187-189). The Assistant Secretary pointed out that the anti-speculation policy had been superseded and broadened by the land conservation policy which dictated an identical result. It required that no transaction be consummated, in the absence of a binding contract, where the Government would not receive a full return for the sale of public land.

On April 6, 1964, a check in the sum of \$9,150 was issued to the appellants. On April 10, 1964, it was returned to the Manager of the Phoenix Land Office with a letter stating appellants' intention to seek judicial review. The \$9,150 has been



placed in a suspense account and is available to the appellants at their request.

In the district court proceeding, the defendants-appellees' motion for summary judgment was granted and the plaintiffs-appellants' motion for summary judgment was denied. The court held that the Secretary had the discretion to accept or reject the offer of the plaintiffs-appellants up to the time a cash certificate was actually issued. It pointed out that the local land office sale was an auction with reserve, as was held in Ferry v. Udall, 336 F.2d 706, 710 (C.A. 9, 1964), cert. den., 381 U.S. 904, and Willcoxon v. United States, 313 F.2d 884 (C.A. D.C. 1963), cert. den., 373 U.S. 932. The court refrained from ruling upon the plaintiff's contentions as to the necessity of an evidentiary hearing or publication of departmental policies in the Federal Register and did not reach the question of whether the Administrative Procedure Act required judicial review of the exercise of agency discretion herein involved. However, the court did further rule that there was no conflict between Sections 7 and 14 of the Taylor Grazing Act (R. 193-196).

## SUMMARY OF ARGUMENT

1. The facts and the applicable statutes and administrative regulations involved in this case are almost identical to those in the case of Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), cert. den., 381 U.S. 904. The substance of this appeal may be disposed of by a reading of that opinion. Appellants' attempts to distinguish this precedent fail as they do not point to a single fact or transaction that could change the legal significance of those in Ferry.

2. Appellants fail to show that the Ferry decision is wrong. That case flatly held that no rights vest until the issuance of a cash certificate. Further, no rights are derived by reference to Section 7 of the Taylor Grazing Act because that Act clearly has to do with homesteading, and has no applicability to the sale of isolated tracts at public auction. Finally, the fact that appellants never attained any legal or equitable rights in the property involved herein makes their remaining arguments irrelevant and without merit.

ARGUMENT

I

THIS COURT'S DECISION IN FERRY v. UDALL IS  
DISPOSITIVE OF THE ISSUES IN THIS CASE

At the outset it must be noted that this Court's decision in Ferry v. Udall, 336 F.2d 706 (C.A. 9, 1964), cert. den., 381 U.S. 904, constitutes a veritable brief in opposition to appellants' points. Appellants recognize this at page 18 of their brief, where they acknowledge that in alleging any rights under the statutes involved they must "face head on" not only Ferry v. Udall, supra, but also Willcoxon v. United States, 313 F.2d 884 (C.A. D.C. 1963), cert. den., 373 U.S. 932.

The Ferry opinion was occasioned by two factual situations <sup>2/</sup> that were almost identical to the situation in this case. Since it is appellees' position that Ferry is controlling here, we ask the Court to note the similarity of facts (336 F.2d 708, 709):

A summary judgment for defendants was entered in each case and on identical grounds. Because of the similarity in the facts involved and the identity of issues raised, the two cases were consolidated for the purposes of this appeal.

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<sup>2/</sup> The Ferry v. Udall and Freeman v. Udall cases were consolidated for appeal.

The essential facts in both cases are undisputed. The Secretary invited bidding on certain isolated tracts of public lands exposed for sale pursuant to authority vested in him under the Isolated Tracts Act, Rev. Stat. §2455, as amended, 43 U.S.C. §1171 (1958). Freeman and Ferry submitted bids on the particular tracts involved in their respective cases. In both cases they were declared by the Land Manager to be high bidder, paid the bid price, and received receipts therefor.

In prolonged proceedings which followed in the Freeman case, the Manager's decision that Freeman was the preferred bidder was affirmed by the Secretary, through his Solicitor, who, in his decision, declared Freeman "purchaser" of the land. After prolonged proceedings in the Ferry case, the Assistant Secretary of Interior resolved, in Ferry's favor, a challenge that the bidding was unethical, but remanded the case to the Land Manager for further consideration.

In each case, before the cash certificate was issued, the Secretary determined that the appraisal value of the lands in question had been understated and that the true value of the land at the time the bids were received was several times higher than the bid price. On the basis of this, the Secretary entered orders vacating the sales. Freeman and Ferry then instituted the actions involved in this appeal. (Footnotes omitted.)



Briefly stated, this Court held on the above facts that (1) no rights accrued to the appellants prior to the issuance of a cash certificate (p. 709), (2) the proceedings up to the issuance of the cash certificate constituted an auction with reserve (p. 710), (3) the Secretary's activities under the Isolated Tract Act are discretionary (p. 710), (4) the Secretary had discretion to refuse to sell for whatever reason he found adequate (p. 711), (5) the Secretary's refusal to issue cash certificates is not subject to judicial review (p. 711), and (6) the situation at hand is distinguishable from the many types of cases having some mandatory element in the controlling statutes (pp. 712, 713).

These points of law counter the substance of appellants' arguments. Appellants, however, attempt to distinguish the Ferry decision from the case at hand on four points (Br. 18-19).

First, they contend that here there exists a situation where the Local Land Office based its refusal to issue a cash certificate on a ground different from that of inadequate price, which was used by the Secretary in affirming such refusal (Br. 18). This is not true and is no distinction. Concededly, the original refusal was based on the Department of the Interior's anti-speculation policy and the second on its



land conservation policy. But the different names given the policies were merely due to the change in Administrations. Both refusals were based on inadequacy of price. The initial decision of June 6, 1960, found that (R. 99):

(b) the land is within the influence of expanding cities or towns where the land uses are changing to more intensive uses.

Secretary Seaton's anti-speculation policy had its raison d'etre in inadequacy of price. Note that this policy (issued February 5, 1960) was occasioned by hearings held two weeks previous (January 21, 22, 23, 1960) in the Phoenix, Arizona, area by the Special Subcommittee of the Committee on Government Operations of the House of Representatives. The purpose of these hearings was stated as follows:

[T]o gather facts from which we may determine the validity of complaints received by the committee that public land of the United States is being disposed of by the Department of the Interior, through exchanges and sales, at prices based upon faulty and deficient appraisals, representing in many cases only a small fraction of the true value of the land.

Hearings, H. Subcommittee of the Committee on Government Operations, "Land Appraisal Practices," 86th Cong., 2d sess. (1960)

p. 1. Moreover, if the final decision were based on solid ground, it would be of no moment here that the earlier was on some other ground.

Secondly, appellants attempt to distinguish Ferry by saying in Ferry the fact that the original appraisal was a mistake was not at issue (Br. 18). This contention does not serve to distinguish Ferry. Whether or not the original appraisal in that case was at issue becomes irrelevant in the light of the Court's language at page 711 in talking about an attempt to distinguish the Willcoxon case.

\* \* \* the Secretary, in his discretion, may refuse to sell for whatever reason he finds adequate.

Appellants' third and fourth attempts to distinguish Ferry boil down to saying that reappraisal of the property took  $4\frac{1}{2}$  years and the anti-speculation policy discriminated against appellants (Br. 19). It is true that an exact figure as to the true 1959 value of the land in question was not handed down until 1963, but just as in Ferry and Freeman the property was in essence declared to be undervalued by the initial refusal to issue a cash certificate (in this case on June 6, 1960) (R. 99).

Likewise, the anti-speculation policy, if it can be said to have discriminated, worked more to the detriment of Ferry and Freeman, who had much larger sums to reap, had they succeeded in obtaining cash certificates (336 F.2d 708, 709, footnotes 2 and 3).

Appellants' only variation from Ferry is their unique theory that they acquired vested rights under Section 7 of the Taylor Grazing Act by virtue of their application to buy public land (Br. 19, 20). That point was correctly not urged in Ferry and Willcoxson because, as we shall show, it plainly lacks merit.

## II

### APPELLANTS MAKE NO SHOWING THAT FERRY IS WRONG

A. No rights vest under the Isolated Tracts Act before issuance of the cash certificate. - Ferry and Willcoxson spell out why the Secretary of the Interior is clearly correct in so holding. We will not burden the Court with a repetition of the reasoning of those cases. Appellants fail, we feel, to show any error therein. In this connection, the Court should be advised that the further question, whether rights vest after issuance of the cash certificate and before patent, is presently involved in other litigation, and nothing in this brief should be interpreted as an apparent concession by the appellees that upon issuance of a cash certificate rights do vest.

B. Appellants derive no rights from Section 7 of the Taylor Grazing Act or the Secretary's regulations. - Section 14



of the Taylor Grazing Act (Isolated Tracts) in now way depends upon Section 7 (involving homestead classification). The Isolated Tracts Act contemplates the disposal of public land at auction. The authorization for such sales originally derives from Section 5 of the Act of August 3, 1846. It enabled the Commissioner of the Land Office to order into market "isolated or disconnected tracts or parcels of unoffered lands, which in his judgment it would be proper to expose for sale \* \* \*." This Section was designed to dispose of lands, which by virtue of their isolation would not be useful in other ways. Section 5 was unique and an entity unto itself. It did not depend on the homestead policy or any other policy; rather, it served to remove from the public domain land, which, although valuable, was not compatible with other land programs.

The situation has not changed today. Though the present statute enlarges the scope of the Section, <sup>3/</sup> it is

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3/ The Act of July 30, 1947, increased the size of the isolated tract or parcel allowed sold at public auction from 760 acres to 1,520 and substituted 760 acres for the former 160-acre limit with regard to the sale of mountainous tracts.

evident the same purpose inheres, Section 14 (43 U.S.C. sec. 1171) reads in pertinent part:

[I]t shall be lawful for the Secretary of the Interior to order into market and sell at public auction, \* \* \* any isolated or disconnected tract \* \* \*. (Emphasis added.)

Appellants seek to derive some comfort from Section 7 of the Taylor Grazing Act, 43 U.S.C. sec. 315(f) (Br. 19-22). Their contentions in this regard, however, are not applicable, since Section 7 deals exclusively with homesteading. A reading of this Section shows it has nothing to do with competitive auction sales (43 U.S.C. sec. 315(f)):

The Secretary of the Interior is authorized, in his discretion, to examine and classify any lands \* \* \* which are more valuable or suitable for the production of agricultural crops \* \* \* and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable public-land laws except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. \* \* \* [Emphasis added.]

It is obvious that the above language is geared to classification and not disposal. Moreover, the history of "homestead entry" demonstrates that it is a method of acquiring public land at little or no cost at all. Such acquisition



has usually carried with it the obligation of living upon the land and improving it. This is quite a different thing from an auction sale in the market, as required by Section 14.

A reading of the Secretary's current homestead regulations (43 C.F.R., subpart 2211) which implement Section 7 of the Taylor Grazing Act, demonstrates the separate operation of Section 7 from Section 14. These regulations provide for the payment of only nominal fees by the applicant-entry-man, <sup>4/</sup> while they set up strict standards and obligations with which the homesteader must comply. <sup>5/</sup> In fact, it was just the compliance with such burdensome homestead requirements to which many of appellants' authorities refer. <sup>6/</sup> It

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<sup>4/</sup> 43 C.F.R. sec. 2211.1-3.

<sup>5/</sup> Sec. 2211.0-6 (qualifications and disqualifications.)

Sec. 2211.2-1 (habitable house)

Sec. 2211.2-3 (cultivation)

Sec. 2211.2-5 (cancellation for non-compliance)

<sup>6/</sup> Frisbie v. Whitney, 76 U.S. (9 Wall.) 187 (1869). (Br. 30);

Lyttle v. Arkansas, 50 U.S. (9 How.) 314 (1850) (Br. 30, 37);

United States v. Fitzgerald, 40 U.S. (15 Pet.) 407 (1841) (Br. 30);

The Yosemite Valley Case, 82 U.S. 77 (1872) (Br. 29);

Danials v. Wagner, 237 U.S. 547, (1914) (Br. 35) (substitution of land under Forest Act of 1897).

is the broad distinction between the homestead process and public auction which makes these authorities inapplicable and defeats the argument that Section 7 has given appellants an "inceptive or inchoative right" (Br. 27).

Finally, the legislative history of Section 14 leaves no doubt as to the independence of the Isolated Tracts Act from the homestead laws. S. Rept. No.547, Senate Committee on Public Lands, July 15, 1947, U.S. Cong. Code Service p. 1510, reads in part:

There are tracts of public lands over 760 acres in many areas of the country which are effectively isolated from other public lands. There is no good reason why the government should retain ownership over them. The Interior Department advises us there is no use holding them for homesteaders, because if they had been suitable they would have been homesteaded years ago, and being isolated they are not so situated that they can be included in a land program.

Appellants also point to the Secretary's regulations, 43 C.F.R. secs. 250.11 and 250.12, as being declarative of rights derived by appellants by virtue of their high bid and compliance with application procedures (Br. 22). The simple answer to this is that appellants ignore the provisions of

43 C.F.R. sec. 250.5 that "no action taken will create any contractual or other obligation of the United States until the issuance of a cash certificate." <sup>7/</sup>

C. Appellants' other Arguments are irrelevant and without merit. - Appellants make three further contentions: (1) that the Secretary's action in this case is reviewable under the Administrative Procedure Act, (2) that the Interior Department's anti-speculation and land conservation policies constituted a bill of pains and penalties, and (3) that these policies should have been in the form of regulations and should have been published in the Federal Register. <sup>8/</sup>

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7/ This argument was presented in Ferry. The Court met the issue squarely (336 F.2d 711):

The second argument along this line is that the offers of the appellants were accepted when they were declared to be "high bidder" and "purchaser." The significance of this, they argue, is that 43 C.F.R. §250.5 is directed only to "applicants" and "bidders" and, by being designated "purchasers," they were put in a category of persons to whom the regulations do not apply. The argument overlooks the fact that 43 C.F.R. §250.5 expressly states that bids are accepted only by the issuance of the cash certificate and that no other action "taken will create any contractual or other obligation of the United States."

8/ This complaint of appellants is not put forth directly. Rather in a number of places in their briefs (p. 7, 9, 10, 31, 33), it is used cumulatively to buttress the general allegation that the Secretary acted outside the law.



These items become irrelevant when it is shown, as has been done above and in the Ferry and Willcoxon opinions, that appellants never acquired any rights of which they could be deprived. Despite this, the contentions have other failings

First, the Isolated Tracts Act comes under the exception to Section 10 of the Administrative Procedure Act, which precludes from judicial review agency action by law committed to agency discretion. So this Court squarely held on page 711 of the Ferry decision. We need not add to the list of cogent support that the Court provides in its opinion.

Secondly, the facts of this case in no way fit the definition of a bill of attainder, <sup>9/</sup> to wit, legislative acts that apply to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. Garner v. Los Angeles Board, 341 U.S. 716, 772 (1951); United States v. Lovett, 328 U.S. 303, 315 (1946).

Finally, if any question be raised as to the necessity for more regulations and publication in the Federal Register

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<sup>9/</sup> A bill of pains and penalties is a bill of attainder imposing a punishment less than death. Such bills are within the constitutional prohibitions against bills of attainder. Drehman v. Stifle, 8 Wall. 595, 601 (1869).

when the anti-speculation and land conservation policies were announced, it is answered simply by noting that these policies are too general to lend themselves to specific regulations, that they could be implemented by already-existing regulations (as they were in this case by 43 C.F.R. sec. 250.5), and that they amounted to nothing more than an assertion that the public interest would be protected. Furthermore, appellants do not complain of lack of notice, and Section 3 of the Administrative Procedure Act, 5 U.S.C. sec. 1002, does not contemplate the publication in the Federal Register of such a broad and generalized policy. In any event, it is hard to see how the lack of publication in the Federal Register conferred any rights on appellants to the land they claim.

#### CONCLUSION

For the forgoing reasons we submit the judgment of the district court should be affirmed.

Respectfully,

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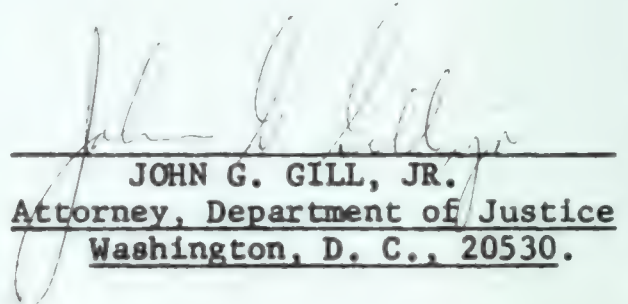
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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

  
\_\_\_\_\_  
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**No. 21167**

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

PERLEY M. LEWIS and MILDRED C.  
LEWIS,

Appellants,

STEWART L. UDALL, as Secretary of  
the United States Department of the  
Interior, et al,

Appellees.

On appeal from the  
United States District  
Court for the  
District of Arizona

APPELLANTS' REPLY BRIEF

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Appellees.

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On appeal from the  
United States District  
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APPELLANTS' REPLY BRIEF

STATEMENT OF THE CASE

In the Court below this matter was first brought to the attention of the Court by Appellees' Motion for Summary Judgment to which Appellants responded and filed their own Motion for Summary Judgment. The facts as set forth by Appellants in their Motion for Summary Judgment were not disputed by Appellees and are therefore not at issue in any way.

The facts as set forth in Appellants' original brief beginning on Page 5 dealing with history of the case are therefore the facts which this Court must take as true for the purposes of this appeal.

Appellants again bring to the attention of the Court several

of those matters which Appellees overlooked in their statement of the case which were stated in Appellants' Brief.

The notice of sale used in the original sale had no conditions or reservations upon the same as do the present notices of sale and did not contain any conditions that the authorized officer had the power to reject any bids prior to the issuance of a cash certificate.

Appellants again point out that in the lower Court as set forth in Appellants' Brief, the Appellees admit that Appellants had taken proper procedure under 43 CFR 250 and by January 25, 1960, the Appellants had done everything necessary required of them under the law and regulations to purchase the land and that the only remaining thing to be done was a ministerial act of the manager in directing the issuance of cash certificate and patent and that the manager failed to do so for over five months.

Further, Appellees failed to acknowledge in their statement of the case those facts as set forth by Appellants in their opening brief pointing out the unusual delay involved in this case and the unusual application of an (unpublished in the Federal Register) Press Release policy to twice strike down Appellants' entry and Appellees failed to point out that unlike in the *Ferry* case and entirely different from the *Ferry* case, there was no mention of improper appraisal of the land until the final decision of the Secretary over four years after the initial approval of the sale and failed to acknowledge what they did in the lower Court, to-wit: That this appraisal was reached after the Secretary had already issued an unsigned written decision in essence telling the appraiser that he wanted the land to be appraised at higher than the original appraisal (See Appellants' Opening Brief, Page 11).

Appellee also leaves out the fact that was admitted in the lower Court that Appellants were classified as speculators, a point which is very important to one of Appellants' grounds for appeal.

## STATUTES AND REGULATIONS INVOLVED

On Page 4 of Appellees' Brief their quotation of Section 7 of the Taylor Grazing Act, 43 USC, Section 315 F is correct except on the ninth line of their quote of said section after the word "production" they leave out the words, evidently by typographical error as follows: "of agricultural crops than for the production".

They also leave out that section of the Statute which is important to this case which follows after the last line of their quotation of Section 7 and said deleted portion reads as follows:

" . . . Provided, that locations and entries under the Mining Laws, including the Act of February 25, 1920, as amended, may be made upon such withdrawn and reserved areas without regard to classification and without restriction to limitations by any provisions of this Act. Where such lands are located within grazing districts, reasonable notice shall be given by the Secretary of the Interior to any permittee of such lands. *The applicant after his entry, selection or location, is allowed, shall be entitled to the possession and use of such lands:* Provided that upon the application of any applicant qualified to make entry, selection or location, under the Public Land Laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract to be classified and such application if allowed by the Secretary of the Interior, *shall entitle* the applicant to a preference right to enter, select, or locate such lands if opened entry as herein provided. (43 USC, Section 315f)." (Emphasis Supplied)

Appellees correctly quote certain portions of Part 250 of 43 CFR, to-wit: 43 CFR 250.5, 43 CFR 250.11 (a), 43 CFR 250.11 (f) and 43 CFR 250.12 (c). However, the whole part 250 of 43 CFR applies and one particular part is quite important for this Court to consider to reject one of the positions of Appellees in their Brief.

43 CFR 250.4 (b) states as follows:

"(b) The authorized officer may classify *under Section 7 of the Taylor Grazing Act* of June 28, 1934 (48 Stat. 1272; 43 USC 315 (f) as amended, *land for offering under this part.*



and he may authorize such offering of the land for sale if he determines, in accordance with existing regulations and procedures, that such land is suitable for disposal *as an isolated or as a rough or mountainous tract, as the case may be.*" (Emphasis Supplied)

Other regulations which the Court should consider in Appellants' Response to Appellees' Brief are 43 CFR 296 which deals with the classification of public lands under Section 7 of the Taylor Grazing Act and shows that Section 7 is used for the classification of all sorts of lands, not just homesteads. The appropriate regulations are as follows:

"Section 296.1. STATUTORY AUTHORITY. (a) *Section 7 of the act of June 28, 1934 (48 Stat. 1272), as amended by the act of June 26, 1936 (49 Stat. 1976; 43 U.S.C. 315f), authorizes the Secretary of the Interior in his discretion to examine and classify any lands withdrawn or reserved by Executive Order 6910 of November 26, 1934, or Executive Order 6964 of February 5, 1935, and amendments thereto, or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than the use provided for under said act, or proper for acquisition in satisfaction of any outstanding lien, exchange, or scrip rights of land grant, and to open such lands to entry, selection, or location for disposal in accordance with such classification under applicable land laws.* Executive Order 6910, Executive Order 6964, and Section 7 of the Taylor Grazing Act, do not apply to public lands in the Territory of Alaska."

Section 296.6 PREFERENCE RIGHT OF APPLICANT; ORDER OF OPENING TO BE ISSUED WHERE PREFERENCE-RIGHT APPLICATION IS REJECTED. *Where public land is classified under section 7 of the Taylor Grazing Act pursuant to an application, the applicant is entitled to a preference right of entry.* If, however, after classification it should be necessary for any reason to reject the application, the land will not become subject to application by persons other than the preference-right applicant until an appropriate order of opening has been issued."

"Section 296.7 REQUIREMENTS TO EARN TITLE. *Upon allowance of an application to make entry*, location or selection of public land classified as provided in Sections 296.1-296.9, all the laws and regulations governing the particular kind of entry, location, or selection applied for must be complied with in order *to earn title to the land*." (Emphasis Supplied).

Appellants would also like to point out that Appellees point to the Secretary's new regulations which have been in effect since 1964 completely emasculating and changing 43 CFR 250.5 These regulations are in many ways entirely different from 43 CFR 250 which was in effect when Appellants' case arose.

## SUMMARY OF ARGUMENT

Appellants again request the Court to pay particular attention to the arguments set forth in Appellants' Brief but for the purposes of this Reply Brief reply to Appellees' summary of argument as follows:

### I

The Court in the *Ferry* case failed, for one reason or another, to take into consideration all of the regulations as set forth by appellants and the Statutes which Appellants state are applicable to the case at hand.

### II

The facts involved in this case are not identical to those in the case of *Ferry vs. Udall*, 336 F2d 706 (CA 9, 1964) and Appellants state that the procedure taken by the Secretary and the actions taken by the Secretary and the office under his supervision were entirely different than those stated in the *Ferry* case.

Appellants have shown that the *Ferry* decision in part was in error. That rights do accrue prior to the issuance of a cash certificate. That the gravamen of the situation is not the issuance of the cash certificate but the acts done by the entryman that entitled him to a cash certificate. That Section 7 of the Taylor Grazing Act *does not deal exclusively with homesteading* but

on the contrary has direct application to the sale of isolated tracts under Section 14 of the Taylor Grazing Act as it will be clearly shown herein by the statutes and by the Secretary's own regulations in force and effect at the time this case arose. That the remaining arguments of Appellants in their brief are very relevant and with merit.

That the specification of errors relied on by Appellants and the questions presented are applicable to the facts at hand and are determinative of this case.

## ARGUMENT

### I.

*The rights of the Appellants, their denial, the error of the Terry case and its inapplicability to the case at hand.*

Appellees' Brief, in one sentence, on Page 1, disposes of the matter of the opinion below. And in two sentences on Page 2, both citing *Terry vs. Ullall*, 356 Fed. 2d 706 (CA 9, 1961) cert. den. 381 U.S. 904 dispose of the questions presented.

For a summary of the opinion of the Court below, we respectfully call attention to Pages 12 and 13 of Appellants' Brief and particularly the language of the Court below in the last paragraph thereof which appears on Page 195 of the record.<sup>1</sup>

In this decision the equities are well stated by the Court but we feel, the remedy is misstated.

Assuming, merely for the purposes of argument, that the facts

<sup>1</sup> Notwithstanding the foregoing and the resulting judgment in this matter it appears to this Court that either the statutes or the regulations of the Department are sorely in need of revision. This, in order that citizens of the United States who, in good faith, comply with the many tedious requirements in order to insure their qualification to come within the scope of the statutes and regulations for the acquisition of public lands duly noted for sale, are not summarily cast aside by a change in policy or summary decisions to withhold the cash certificate. The remedy for this unhappy situation rests, however, with the Congress of the United States, or the Executive Department, and not with the Courts."

in this case were similar to the facts in the *Ferry* case, which they are not as set out in Appellants' Brief and admitted by Appellees, the whole gravamen is the misinterpretation of one particular regulation of the Secretary, 43 CFR 250.5. This regulation should be considered carefully in the light of Appellants' Brief on Pages 28, 29 and 30. The power to determine under this regulation should be the power to determine in a judicial nature. This Court should agree with the Supreme Court of the United States in *Payne vs. New Mexico* (1921) 225 US 367 as to what the true import of language similar to that contained in 43 CFR 250.5 is. This point was also agreed to by the Supreme Court of the United States in *Wyoming vs. United States*, 255 US 489 (1921).

The essence of the claim of the Secretary of the Interior as to the meaning of the discretionary power given to him by 43 CFR 250.5 is to interpret the same as to give him dictatorial power to use against people who have made a qualified entry such as the Appellants in this case. However, the truth of this power is best described by the Supreme Court of the United States in *Daniel vs. Wagner*.<sup>2</sup>

As set forth on Pages 35 and 36 of Appellants' Brief and which we repeat here in part as follows:

"... When these conclusions are accepted it results that the claim of discretionary power is substantially this: That in a case where, under an Act of Congress, a right is conferred to make an application to enter public land, and a duty imposed upon the Department to permit the entry, the Department is authorized in its discretion to refuse to allow that to be done which is commanded to be done, and thus deprive the individual of the right which the law gives him. And it becomes, moreover, certain that the necessary result of this assertion is the following: That although Congress may have the power to provide for the disposition of the public domain *and fix the*

<sup>2</sup>237 US 547, 557, et seq., 35 S. Ct. 740, 59 L. Ed. 1102, LRA 1916A, 1116.



*terms and conditions upon which the people may enjoy the right to purchase*, it has not done so, since every command which it has expressed on this subject may be disregarded, and every right which it has conferred on the citizen may be taken away by an unlimited and undefined discretion which is vested by law in the administrative officers appointed for the purpose of giving effect to the law. When the true character of the proposition is thus fixed, it becomes unnecessary to go further to demonstrate its *want of foundation*." (Emphasis supplied).

There are five questions presented to this Court, not two as Appellees would have this Court determine. These questions are presented in Appellants' opening brief and involve not only abuses of discretion by the Department and the Secretary of the Interior, but also involve a non compliance with an Act of Congress, which Act he is charged with the administration of.

The questions presented involve acts and proceedings which are not governed by any so-called "Isolated Tracts Act". They are governed by and come under Section 7 and Section 14 of the Taylor Grazing Act of June 25, 1934, Section 14 being 43 USC 1174 and Section 7 now being 43 USC 5151 and Section 7 having been amended in the year 1936.

The questions presented also involve violations of the rights of Appellants under the Constitution and the Fifth and Fourteenth Amendments thereto.

The facts in this case show clearly that the subject public auction sale was made under 43 USC 1171, which is to say Section 14 of the Taylor Grazing Act, using procedures set forth under Section 7 of the same Taylor Grazing Act which is now set forth in the code as 43 USC 5151. This the Appellees' Brief admits, but immediately Appellees desire to start calling this a separate act, to wit: "The Isolated Tracts Act" when in essence it is nothing more than the "isolated and disconnected and rough and mountainous" section 14 of the Taylor Grazing Act.

This Appellees do because they would obviously like to maintain the fiction set up in *Ferry vs. Udall*, supra, that it was based

on a separate Congressional Act some eighty years of age, to-wit: "The Isolated Tracts Act".

The decision in the *Ferry v. Udall* case never mentioned by name the Taylor Grazing Act nor did it mention by name either Section 14 or Section 7 of the Taylor Grazing Act but referred throughout to a non-existent "Isolated Tracts Act".

As Appellants states, on Page 5 under "(b) History of the Case" by reason of Appellees' Motion for Summary Judgment in the Court below, Appellants' facts as stated by Appellants *are not in dispute*. Appellees attempt to maintain the fiction that the sale was held under some non-existent act known as the "Isolated Tracts Act" which never was a separate act of Congress at all but merely a section of an Act known as the Taylor Grazing Act.

Why and how do Appellees now try to do this?

First, on Page 2 of their Brief, when they mentioned Section 14 of the Taylor Grazing Act, they hasten to refer to it as "The Isolated Tracts Act" and they again and again do this wherever possible at presumptively telling points in their brief.

Secondly, they never fully quote all the language of Section 14 of the Taylor Grazing Act. On pages 2 and 3 of their brief, although they do not say in prelude that Section 14 provides in part, they merely say it "provides".

And then they proceed to quote only the first proviso of Section 14 and leave out entirely the last eleven lines of that section which includes not only the second proviso (the rough and mountainous section) but another proviso also.

This in an apparent attempt to not disclose the fact that as expanded and inserted into the Taylor Grazing Bill by the Senate of the United States, and as it was in said Bill and finally adopted in conference, (not as an amendment to the Act after its passage), the said Section 14 was expanded into a section which, as passed as an integral part of the entire Bill and subject to all the language thereof, was in fact "the isolated and disconnected and rough and

mountainous" section of the Taylor Grazing Act (in like manner as its Section 8 was another disposal section providing for exchanges thereunder).

Section 14 was in the Taylor Grazing Act when it became law on June 28, 1934 (48 Stat. 1269).

Third, Appellees allege on page 18 of their brief that Section 7 of the Taylor Grazing Act has nothing whatsoever to do with the disposal sections of the Taylor Grazing Act. Specifically they allege that "Section 7 deals exclusively with homesteading".

This statement is simply not true. The record is clear that from December 31, 1954, up to April 1, 1964, public sales were governed by Part 250 of the regulations.\* And that during all of that time there were in as a part of those regulations two sections of 43 CFR as follows:

43 CFR 250.1 'Statutory Authority' and 43 CFR 250.4 (b) 'Action upon the application or in the absence of applications.'

43 CFR 250.1 clearly recited Section 14 of the act of June 28, 1934 (48 Stat. 1274; 43 USC 1171).

43 CFR 250.4 (b) stated in part as follows:

(b) The authorized officer may classify under Section 7 of the Taylor Grazing Act of June 28, 1934, (48 Stat. 1272; 43 USC 515f) as amended, land for offering under this part, and he may authorize such offering of the land for sale if he

Congress never did enact a separate Act entitled "The Isolated Tracts Act". On August 3, 1846, there was approved "An Act providing for the Adjustment of all suspended Preemption Land Claims in the several States and Territories". Section 5 of this act provided for the sale of lands of the "second class" and also "isolated and disconnected" tracts. This section 5 was incorporated into the Revised Statutes as Section 2451 and amended, and further expanded by the Senate and placed in the House Bill, the Taylor Bill, in lieu of the language of the House, and the Senate version was agreed to and was in and a part of the Bill when it was approved and became Law June 28, 1934, as The Taylor Grazing Act (48 Stat. 1269). The Section 5 of the Act of August 3, 1846, did not provide for public auction sale, did not provide for sale of mountain and mountainous lands, did not provide for evaluation, and sold land at \$1.25 per acre.

\*43 CFR 250.1 and following.

determines in accordance with existing regulations and procedures, that such land is suitable for disposal *as an isolated or as a rough or mountainous tract, as the case may be.*" (Emphasis supplied).<sup>5</sup>

Moreover, for confirmation of this, one has but to refer to Part 296 of the regulations which were in effect unchanged from December 31, 1954, to April 1, 1964, to find spelled out in detail under 43 CFR 296.2 to 43 CFR 296.7 the *action upon the application* where classification is required under Section 7 of the Taylor Grazing Act. And a reading of these said sections show quite plainly that the application of Section 7 was *not* exclusively with homesteading; and they further show and spell out that upon the allowance of the application the applicant does have thereafter rights which, under 43 CFR 296.7 set forth the "Requirements to Earn Title", upon full compliance with the law and regulations.

But what about the language of Section 7 of the Taylor Grazing

<sup>5</sup>In the case of Nelson A. Gertzel, A-2716 (July 12, 1941 — Decisions of the Department of the Interior), the Department said:

"In large part, the national policy of conservation and development of the public domain and its natural resources is implemented by the Taylor Grazing Act and in particular as to classification by Section 7 and by the executive orders mentioned therein . . .

"This withdrawal and reservation may however be terminated by the Secretary in his discretion. Upon examination an appropriate classification of any of these withdrawn lands which the Secretary finds are less valuable for grazing than for some other of the uses described in Section 7, the Secretary has authority under this section to restore them to entry, selection or disposal in accordance with his classification under applicable public land laws."

In addition, it was stated on said case on Page 228 (64 ID.):

"However, the Secretary of the Interior is, by Section 7 of the Taylor Grazing Act, as amended authorized, in his discretion, to examine and classify any of the withdrawn lands which are more valuable or suitable for the production of agricultural crops and for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for by that act, or proper for acquisition in satisfaction of any outstanding lieu, exchanges, script rights or land grant, and to open such lands to entry, selection or location for disposal in accordance with such classification under applicable public land laws."

Act as quoted by Appellees in support of their contention that Section 7 deals exclusively with homesteading?

The answer is bluntly that Appellees on their said page in their said brief, particularly on Page 18, do not quote Section 7 of the Taylor Grazing Act. They quote only 68 words out of 329. They do this in three disconnected parts. They emasculate and dismember the section.<sup>6</sup>

The Taylor Grazing Act, by virtue of its authority under its Section 1 to set up grazing districts over the public domain, and by virtue of the withdrawal and reservation of the public domain lands under the Executive Orders set forth in the forepart of

<sup>6</sup>For the edification of the Court, Section 7 is set forth below in full. Those portions italicized are those portions which Appellees deleted from their quotation of Section 7:

"Section 7. The Secretary of the Interior is hereby authorized in his discretion, to examine and classify any lands, *withdrawn or reserved by Executive order at November 20, 1934 numbered 69101, and amendments thereto, and Executive order of February 5, 1935 (numbered 6964), or within a grazing district, which are more valuable or suitable for the production of agricultural crops than for the production of range grass and forage plants, or more valuable or suitable for any other use than the use provided for under this Act* or for the acquisition in satisfaction of any outstanding lien, exchange or cession, *tract or land grant and to open such lands to entry, selection or location for disposal in accordance with such classification under applicable public land laws except that homestead entries shall not be allowed for tracts exceeding three hundred and twenty acres in area. Such lands shall not be subject to disposition, settlement, or occupation until after the same have been classified and opened to entry. PROVIDED, that locations and entries under the mining laws, including the Act of February 25, 1920, as amended, may be made of or in such withdrawn and reserved areas without regard to classification and without restrictions and limitations by any provision of this Act. Where such lands are located within grazing districts, *mining claims shall be given by the Secretary of the Interior to any possessor of such lands. The applicant after his entry, selection or location, is allowed, shall be entitled to the possession and use of such lands. PROVIDED, that upon the application of any applicant qualified to make entry, selection or location under the public land laws filed in the land office of the proper district the Secretary of the Interior shall cause any tract to be classified, and such application, if allowed by the Secretary of the Interior, shall entitle the applicant to a preferred right to enter, select, or locate such lands if opened to entry as herein provided. (43 USC, Section 315f)."**



Section 7, has an iron-clad control of the public domain. This was true before passage of the multi-use act in 1965, by virtue of the fact that before any application for disposal or use of the public domain lands "under the public land laws" (the mining laws and Alaska lands excepted) the Secretary had the duty to process any application under any of the said laws "and in his discretion to examine and classify".

The Secretary could deny the application. He could allow the application. Once allowed under Section 7 the language of Section 7 itself, and also the specific language under CFR 296.6 "the applicant is entitled to a preference right of entry", which ripens into title upon completion of requirements as said by the Secretary's own regulations at that time, 43 CFR 296.7.

Fifth, the Appellees next go into the legislative history of the **Taylor Grazing Act**.

If this legislative history is gone into, the Court will easily find that first of all Section 7 and 14 were in the Taylor Grazing Bill when the Senate got through with the bill, and was a part of said Bill when it was approved on June 28, 1934 (48 Stat. 1269). Section 14 was not an independent act but a portion of the **Taylor Grazing Act along with Section 7**.

As originally passed in the Taylor Grazing Act Section 7 of the Taylor Grazing Act dealt only with the classification of land for homestead entries. Could it be that Appellees were looking

7"Section 7. That the Secretary is hereby authorized, in his discretion to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding 160 acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof. PROVIDED, that no lands containing water holes, springs, or water supplies developed or improved by the holder of any grazing permit or his predecessor in interest shall be subject to classification, settlement, entry, or patent under the provisions of this section."

or wishfully thinking of this version of Section 7 when they state that Section 7 now only deals with homesteads.

Section 7 of the initial Bill was objected to by Congressmen both in the House and in the Senate because it dealt only with homesteads and would "absolutely abrogate the homestead law".<sup>8</sup>

This passage of Section 7 restricted the classification of land for entry to only homestead entries. This is the position that Appellees now want to take. However, happily, Congress discovered that this was unworkable and June 26, 1936, the Taylor Grazing Act was amended and Section 7 was amended to enlarge classification for entries to other types of persons who wish to obtain land other than mere homesteaders and to make such classifications available for all persons seeking "private entry" not just homestead entry. The initial Senate report which reported this proposed legislation and whose report was accepted and finally adopted as legislation is contained in Senate Report No. 2371 of the 74th Congress, Second Session. On page 2 of this Senate report, the Senate Committee on Public Lands and Surveys reported as follows:

"It is proposed to amend Section 7 of the Taylor Grazing Act so as to provide a more practicable and satisfactory method of classification of lands within a grazing district and to *make available for private entry* lands which are more valuable for other purposes than grazing." (Emphasis Supplied)

After this report was adopted by the Senate, it was approved by the House.

Therefore, Congress wished to change the law and give the right of entry to all people other than merely homestead entrymen.

The new Section 7 of 1936 of the Taylor Grazing Act further provided that:

"Upon the application of any applicant qualified to make an entry . . . under the public land laws . . . the Secretary of

<sup>8</sup>Congressional Record, 74th Congress, 2d Session, April 10, 1934, page 6569

the Interior shall cause any tract to be classified and such application, if allowed by the Secretary of the Interior, *shall entitle the applicant to a preference right to enter . . .*" (Emphasis Supplied)

In regards to the rights of someone who has made an entry in general, it is stated in 73 CJS Public Lands, Section 41, Page 691 as follows:

"General, one who has made a legal entry on public land acquires an equitable title or equitable rights, but the naked legal title to the land remains in the government until the issuance of a patent therefor. The equitable title cannot, if his entry was legal and valid, be divested without his consent, and his right to the patent can be defeated only by a finding by the land department that he was not qualified to acquire the title, or that the land was not subject to his entry, and in this respect the character of the land is to be determined by the facts as known to exist at the date of such entry."

If Congress had intended to have said Section 7 of the Taylor Grazing Act apply only to homesteads, as Appellees would have this Court believe, then all it would have had to have done would have been to leave said section as it existed in 1934 instead of amending it in 1936.

At this time, Section 14 was still a section of the Taylor Grazing Act along with Section 7. As to what Appellees on Page 20 of their brief call "the independence of the Isolated Tracts Act from the homestead laws", we respectfully point out that Congress never did pass any such named Act as "The Isolated Tracts Act".

The legislative history attendant the initial authority for the sale of isolated tracts which Appellees set forth on Page 17 of their brief, is garbled and with an apparent intent to label the Taylor Grazing Act as the "Isolated Tracts Act".

This, of course, is not so. Section 14 is a section of the Taylor Grazing Act and this Section 14 provides for the sale of "isolated and disconnected and rough and mountainous tracts". To label the Taylor Grazing Act as the "Isolated Tracts Act" even parenthetically as Appellees do on their Page 17 is as misleading and as

wrong as their presentation to this Court in *Ferry vs. Udall* in creating the picture that there actually was a separately named 80-year-old act named "The Isolated Tracts Act".

As it originated in the Act of August 3, 1846, the sale of isolated and disconnected tracts *did* most certainly have to do with both homesteads and sales. The Act of August 3, 1846, was entitled, not the Isolated Tracts Act, but "An Act for the Adjustment All Suspended Preemption Land Claims in the Several States and Territories".

It was Section 5 thereof which provided for the sale of lands of the "second class" and such other "isolated or disconnected" tracts; it covered homesteads and sales. It was this Section 5 of the Act of August 3, 1846, which was incorporated into the Revised Statutes as Section 2455. Sale was not by public auction. Lands were not evaluated, price was \$1.25 per acre, later \$2.00 per acre for certain lands.

So this is the history of Section 2455 of the Revised Statutes, actually Section 5 of the Act of August, 1846, whose title had no more relation to the appellation "The Isolated Tracts Act" as the Taylor Grazing Act has because it embodies within it as its Section 14 a section which provides for the sale of "isolated and disconnected and rough and mountainous tracts".

Yet Appellees persist in attaching the appellation "The Isolated Tracts Act" to both laws. Why? Because in the case of *Ferry v. Udall*, supra, they painted such a picture of an "80 year old" separate one paragraph Act of Congress that the decision of this Court in that case does not even mention Section 7 or Section 14 of the Taylor Grazing Act; does not even mention as such the Taylor Grazing Act itself; but on the contrary speaks specifically of "The Isolated Tracts Act".

On Page 19 and 20 of Appellees brief they take refuge in current regulations and cite 43 CFR, subpart 2211. The question might well be asked what do current regulations have to do with this case? Appellees speak of the 2200 series. These did not

come into being until April 1, 1964.

The eight-year-period we are dealing with in the subject case started April 25, 1956, with the application for public sale (when Appellant was 58 years of age), and the period ended with the final decision of the Secretary on December 20, 1963 (when Appellant was 65 years old).

During that entire period, in fact from December 1, 1954, to April 1, 1964, the regulations applicable to our subject case were Part 250-Public Sales and Part 296-Classifications; and the language never varied during that period as to 43 CFR 250.1 of 250.4(b) or 250.11 or 250.12(c) nor did it vary as to 43 CFR 296.1 or 296.2 or 296.6 or 296.7. It was not until July 28, 1964, that the Secretary made effective the parts 2200 which he tries to inject into the facts at this late date.

On Pages 20 and 21 of their brief, Appellees say that appellants "ignore" the provisions of 43 CFR 250.5.

Appellants do no such thing. It is the Secretary who ignores all of his other regulations of Part 250 and Part 296 in order to make a sovereign use of one of them over all the others. If the Secretary's position is correct, and the position of this Court in the *Ferry* case is correct, then there is no sense in having any of the other regulations under the whole Taylor Grazing Act.

It is appellants who misuse 43 CFR 250.5. They ignore the decisions of the Supreme Court of the United States which say that the language contained in such regulations as 250.5 is not peculiar to just one of the public land laws but on the contrary appears in the regulations covering many of them, that the power of the Secretary in such words is not arbitrary but on the contrary is "judicial in nature" and that it is the plain "duty" of the Secretary under that language to make a "judicial determination" as to whether or not what was required to be done has in fact been done.<sup>9</sup>

In this regard the Court should remember that Appellees have

<sup>9</sup>Daniels vs. Wagner, *supra*.



admitted in the lower Court that Appelants have done all that was required of them to do under the law and the regulations. It is the Secretary who in the *Ferry vs. Udall, supra*, case sold this Court on the proposition that the whole gravamen is not the compliance with the rules and regulations and the performances required thereunder, but the issuance of a piece of paper reciting that these acts have been done.

The Secretary, using an arbitrary and sovereign application of 43 CFR 250.5, interjected new issues four and a half years after the initial sale, merely because a piece of paper, a so-called cash certificate, an inter-office memorandum, had not been issued. He disregards the provisions of 43 CFR 250.5 and 43 CFR 250.12(c) which specifically state that when the acts have been done a cash certificate "will" issue and disregards 43 CFR 296.1-296.7 inclusive, and ignores the Taylor Grazing Act and Sections 7 and 14 thereof in favor of some mythical isolated tracts act.

And to extend the proposition of unbridled power within the Secretary, the Appellees, in their own brief, warned this Court that nothing they state in their brief should be construed to bind them to the position that even the issuance of a piece of a piece of paper called a cash certificate will bind them.<sup>10</sup>

## II

On Pages 13 and 14 of Appellees' Brief, Appellees deny there is any distinction between the two cases involved in *Ferry vs. Udall* and Appelants' Lewis case now before this court. This is simply not the fact. There is a difference. Some of these distinguishing facts from *Ferry vs. Udall, supra*, are:

1. Appelants' sale was vacated by the Manager, Phoenix, Land Office, on the basis of a retroactive application of certain unpublished in the Federal Register "anti-speculation" press release policy pronouncements of February 5 and 23, 1960, issued by Secretary Seaton. No mention was made of price; the Udall policy pronouncements of 1961 had not yet been made.

<sup>10</sup> Page 16 of Appellees Brief.

Neither the *Ferry (Baker)* sale, nor the *Freeman (Copeland)* sale were ever vacated by the Manager, Phoenix Land Office. The *Ferry* case went up to the Secretary through the Director on a charge of illegal bidding at the sale. There the Assistant Secretary struck it down twice, the last time on the basis of price as set forth in the new Secretary Udall's price policies of February 14, 1961.

The *Freeman* case went up to the Director on appeal from a fight between preference right applicants where the Director himself vacated the sale on the basis of price as set forth in the Udall price policies of February 14, 1961.

*Neither of the two cases or sales involved in Ferry vs. Udall case were ever turned down on the basis of the Seaton "Anti-Speculation" policies.*

2. In Appellants' case on October 11, 1960, the Director affirmed the vacating by the Manager of the Applicants' sale on the same basis, that is, the Seaton "Anti-Speculation" policies.

In neither of the two *Ferry vs. Udall* sales were they vacated at any stage for that reason. They were vacated on the basis of Secretary Udall's February 14, 1961, price policies.

3. Some 4<sup>1</sup>/<sub>2</sub> years after the Appellants' sale was vacated by the Manager, Phoenix Land Office, the Secretary considering the case on appeal, injected for the first time the matter of price. He found that the Government's own employees had 11<sup>1</sup>/<sub>2</sub> years before made a mistake in valuating the land, decided the Government had made a bad bargain, and therefore he upheld the vacating of the sale on a basis never before presented in the proceedings.

This 4<sup>1</sup>/<sub>2</sub> year time issue was not prevalent in the two sales involved in *Ferry vs. Udall*.

4. After the Secretary had made the final decision on December 20, 1963, in Appellants' case, and while Appellants' attorney was preparing briefs for the Supreme Court, it was discovered that Arizona State Supervisor, E. I. Rowland, had actually directed the Manager of the Phoenix Land Office to vacate Appellants'

Sale. He did this according to his memorandum letter of June 1960 to the Manager on two (2) grounds:

(a) The retroactive application of the "Anti-Speculation" policies of the Secretary, and

(b) He, himself, had made a unilateral investigation and had determined in his own mind that Mr. Lewis was a speculator and should therefore be punished by having the sale vacated.

and for these two reasons, the Arizona State Supervisor ordered the Manager to vacate the sale of November 3, 1959.

This situation was not present in either of the *Ferry* cases.

5. Other actions of the Secretary and the then Director in the treatment of Lewis during the processing of his appeals, involved, among others, a disregard by those officials of the Secretary's own regulations.

None of these abuses were present in the case of *Ferry vs. Udall*.

Finally, it is to be pointed out that the act of branding Mr. Lewis as a speculator under policies of the Secretary, do amount to a bill of attainder by said Secretary and for this proposition Appellants refer this Court back to his original brief.

### CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's Order granting Appellees' motion for summary judgment and denying Appellants' motion for summary judgment be reversed, and the cause be remanded with instructions to enter an Order granting Appellants' motion for summary judgment and denying Appellees' motion for summary judgment.

Respectfully submitted,

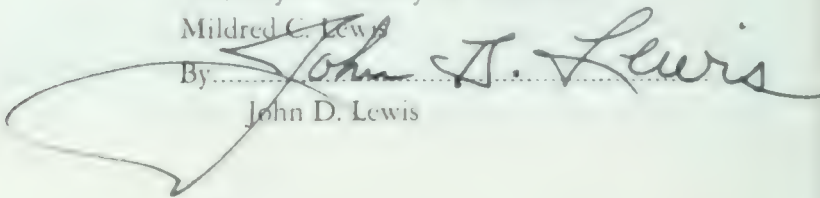
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By.....

John D. Lewis

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No. 21168

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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LOGAN LANES, INC., an Idaho Corporation,  
*Appellant,*

VS.

BRUNSWICK CORPORATION, a Delaware Corporation,  
*Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF IDAHO, EASTERN DIVISION

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**BRIEF OF APPELLANT**

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**FILED**

OCT 1 1966

WM E LUCK, CLERK

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**No. 21168**

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**IN THE**

**United States Court of Appeals**

**FOR THE NINTH CIRCUIT**

---

LOGAN LANES, INC., an Idaho Corporation,  
*Appellant,*

vs.

BRUNSWICK CORPORATION, a Delaware Corporation,  
*Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF IDAHO, EASTERN DIVISION

---

**BRIEF OF APPELLANT**

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**STATEMENT OF PLEADINGS  
AND JURISDICTION**

This action was commenced in the United States District Court for the District of Idaho, Eastern Division, January 21, 1966, by filing the complaint and having summons issued (R 4-13). The summons was handed to the United States Marshal January 24, 1966, and that date he served a copy of complaint on the appellee (R 14) and the cause received its docket number 4-66-5. Subsequent

thereto on February 8, 1966 (R 20 and R 31), sixty four interrogatories (R 15-19) and formal requests for admissions with attached exhibits (R 21-35) were each served on the appellee. On February 14, 1966, the appellee appeared and filed a motion supported by stipulation (R 32) on which the court entered formal Order February 15, 1966 (R 33). March 7, 1966, the appellee appeared through filing a Motion to Dismiss (R 34) and on the same date and without supporting brief, the appellee filed a Motion for Extension of Time (R 36-37). Appellant served and filed on March 25, 1966, Motion for Order Compelling Defendant to Answer Interrogatories (R 38-39) with supporting Brief in support of the motion (R 40-42). Thereafter on April 13, 1966, the appellant filed and served an Amended Complaint (R 43-52); and on April 21, 1966, the appellee filed a Motion to Dismiss the amended complaint (R 53).

Jurisdiction in the original action was maintained (Amended Complaint R 43-45, 47) and the proceedings were commenced (Complaint R 4-5, 7) against the defendant under Sections 15 and 13 of Title 15, United States Code, being part of the act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against the Lawful Restraint of Monopoly", as amended, commonly known as the Sherman Act and the Clayton Act and the Robinson-Patman Act, and in particular that Act of October 15, 1914, c 323, Section 2, 38 Stat 730; June 19, 1936, c 592, Sec. 1, 49 Stat 1526; and this is a suit authorized by the Act of October 15, 1914, c 323, Sec. 4, 38 Stat 731, referred to also as 15 USC, Sec. 15.



The jurisdiction of the District Court was and is invoked pursuant to the above and this being a civil action over which said district court had original jurisdiction pursuant to the act of June 25, 1948, c 646, 62 Stat 931, cited also 28 USC 1337. (Although, jurisdiction might well lie also by virtue of 78 Stat 445, cited also as 28 USC, Sec. 1332.) After hearing in open court on May 20, 1966, the court denied the motion of plaintiff to compel defendant to answer interrogatories and granted defendant's motion for extension of time to answer plaintiff's interrogatories "allowing 10 days after the ruling on defendant's motion to dismiss, for defendant to answer" (R 65). On June 6, 1966, the District Court entered final Judgment in favor of the appellee and against appellant in nature of granting a Summary Judgment (R 104). On June 16, 1966, appellant filed and served on appellee a Notice of Appeal (R 105-106) and Bond for Costs on Appeal (R 107-108) and on June 17, 1966, filed its Designation of Contents of Record on Appeal (R 109-111) and has filed with this court a Designation of the Record and Appellant's Statement of Points (R 114-115).

The jurisdiction of this United States Court of Appeals for the Ninth Circuit is invoked under 28 USC, Secs. 1291 and 1294, that is the following statutes: 62 Stat 929; 65 Stat 726; 72 Stat 348; 62 Stat 930; 65 Stat 727; 72 Stat 348; 73 Stat 10; 75 Stat 417.

## STATEMENT OF THE CASE

### Questions Involved

Substantive and procedural questions are involved on this appeal.

First, we present the procedural questions in the case by a succinct analysis. After ten days from the commencement of the action pursuant to Rule 33 of the Federal Rules of Civil Procedure, the appellant on February 8, 1966 (R 20) served Interrogatories (R 15-20) and on that same date (R 31) pursuant to Rule 36, Federal Rules of Civil Procedure, served appellee with Requests for Admissions. Such requests contained attached exhibits (R 26-30) requesting genuineness and authenticity. Appellee being compelled to answer within twenty days after the service of the summons and complaint upon it or to answer prior to February 15, 1966, pursuant to Rule 12, FRCP, and having ten days to serve written objections or fifteen days to answer the interrogatories pursuant to Rule 33, FRCP, and ten days to deny the admissions requested without same being deemed admitted pursuant to Rule 36, FRCP, and the time periods on interrogatories and requests running from February 8, 1966, when each of these were served, did state to the court a desire for additional time in which to plead to the complaint and in which to answer or object to interrogatories and to deny or respond to requests for admissions, moving the court to extend the time to March 7, 1966, "within which to plead to or answer the said complaint and extend the time in which to object to or answer the said Interrogatories and the time in which to deny or respond to the Requests for

Admissions, up to and including Monday, March 7, 1966, . . ."; and the appellant through its attorney, stipulated that it did not object to such additional time "if such Complaint and Interrogatories and Requests for Admissions be pleaded to, answered or responded to or as appropriate denied on or before March 7, 1966" (R 32), the court then ordered that the appellee, the defendant below, be granted such extension of time and "the Defendant is hereby ordered to answer or otherwise plead to the said complaint and object to or answer the interrogatories hereinbefore served and respond to or deny the several requests for admissions hereinbefore posed on or before March 7, 1966." (R 33).

On the last day and date so allowable the appellee responded to the complaint by filing a Motion to Dismiss (R 34). On this same last day, the appellee filed a Motion for Extension of Time (R 36) and served same that date by mail (R 37). The appellee in filing this latter motion did not file a brief containing a written statement of reasons in support thereof or a memorandum of the points and authorities relied upon by it as so provided by rule of the district court (R 35) being Rule 7 of the United States District Court for the District of Idaho, effective March 7. This rule provides that failure by the moving party to file any instrument or memorandum of points and authorities so provided shall be deemed a waiver by the moving party of such motion (R 35—last paragraph).

Ten days having passed after March 7, 1965, in which to object to the Interrogatories and fifteen days having passed and defendant not having answered said interro-

atories and not having filed any denial to the requests for admissions, the plaintiff then served and filed March 24, 1966, its motion for order compelling defendant to answer the interrogatories (R 38-39).

The appellant by the failure of appellee to deny the admissions asserted and maintained the same should be deemed admitted as provided by rule, and pursuant to the federal rules of civil procedure filed a motion for order compelling appellee to answer the interrogatories (R 38-39), and served and filed brief in support of its Motion to Compel answers to Interrogatories (R 40-42). On April 13, 1966, as allowed by Rule 15, FRCP, the plaintiff filed and served amended complaint (R 43-52). Thereafter the defendant served and filed a Motion to Dismiss the amended complaint (R 53). The procedural questions presented are whether the requests should be deemed admitted, whether the court erred in denying the motion of plaintiff to compel the defendant to answer interrogatories and whether the court erred in granting the motion of the defendant for extension of time and whether the defendant should now be compelled to answer fully each interrogatory having waived objection thereto, and whether the trial court erred in not either ignoring or ordering stricken such motion for extension of time. Further the question is involved whether the trial court prematurely frustrated discovery efforts which appellant asserts were legitimately open to it to explore and develop the facts on public use of competing facilities and other background facts and discover the relevant facts to develop the evidence on which the alleged harm has sprung. The further question involved is whether a trial court has a right to so extinguish

all preliminary discovery efforts, as well as the question of the right asserted by appellant in a party to have all the facts determine the legal consequences, and after refusing preliminary discovery may a court grant judgment against such party denied the benefit to develop the relevant background facts.

The questions involved in granting the Motion to Dismiss directed to the Amended Complaint were raised by the filing of the Appeal to the Judgment (R 105-106).

The substantive questions arise from applying the Robinson-Patman amendments of the Clayton Act to the facts set out in the amended complaint (R 43-52). These questions arose when the court granted the Motion to Dismiss by treating it as a Motion for Summary Judgment which brought into consideration the facts found in the amended complaint, treating such facts therein alleged as true. The facts are found by considering the allegations in the record on pages 43-52. In summary such facts are that Brunswick Corporation, appellee herein, organized and existing under the laws of Delaware, operating a manufacturing plant in Michigan, with its main offices in Chicago, Illinois (Par 4, R 44), is in the business of manufacturing, selling and distributing in interstate commerce, bowling equipment and lanes and property incident to bowling activity and billiard and snooker tables and other machinery and equipment incidental to bowling and billiard operations to customers in the several states of the United States, in the course of which business there is a constant and continuous stream of trade and commerce between the states and the activities of the appellee are



within and directly affect commerce among the several states (R 43-44).

In 1959 appellant, organized as an Idaho corporation (Par 3, R 44), started in business and like other dealers and businesses so situated purchased from appellee equipment, lanes, automatic pin setters and property for the purpose of setting up bowling alleys and charging the public an amount for bowling (Par 6, R 45). From that time and continuously after the appellant remained and is a customer of appellee, ordering from yearly or periodic catalog or price lists supplied it by appellee, and being solicited by appellee at intervals. The appellant makes most of its purchases from appellee. The appellant buys from appellee and appellee sells to appellant commodities in a rather continual and continuous course of dealing (R 46). The cash price for the sixteen lanes and pinsetters was \$212,005.63 (Par 13, R 48)

The lanes and pinsetters and equipment of the appellant have been well maintained and modernized and through a contract with appellee of July 18, 1963, specific modernization was undertaken (Par 14, R 50), wherein other major commodities were sold to appellant at a cash price of \$29,723.24, a higher price than its competition to the extent of the discriminatory percentage (Par 13, R 48-49).

At the time appellant commenced business and since competitors of appellant serve the same competitive area and solicit customers from the same population area and compete for the same customers and among these competitors is a business located in a student union building in

the same county, which particular competitor has always been openly competitive to appellant (Par 10, R 46).

The appellant with other operators of bowling lanes in the area comprising the states of Idaho and Utah have a common interest in maintaining free and unhampered markets for the purchase of bowling lanes, pinsetters, and equipment from manufacturers or distributors and the ability of the appellant and other such operators to maintain and conduct their trade or business is fully dependent upon their ability to purchase without favor or preferential pricing and price discrimination (Par 7, R 45).

Appellant operates an establishment for bowling and billiards known as Logan Lanes in Cache County, Utah, and has caused a large modern building on a large lot to be constructed and invested large amounts of money on equipment and large sums for promotion and advertising and maintains a modern building with large investment in bowling lanes, and related property with a staff to serve its customers and that this business is a competitive business in which the appellant has developed valuable good will and excellent reputation and a large profitable business among its customers, the bowling public in the area, and did enjoy a profitable business until the effect of the discrimination and but for the discriminatory acts it would have continued to enjoy a lucrative business and have increased its profits and prospered (R 45-46).

After the plaintiff started in business the appellee sold to this competitor of appellant commodities of like grade and quality for the use and benefit of such competitor and consumption in its business activities at a price lower than

it sells such commodities of same or like grade and quality to appellant, the price difference being in general sales approximately 17% to 25% lower to such competition than to Plaintiff (Par 13, R 47).

The appellee in one major sale discriminated against the appellant by selling to the Utah State Building Board commodities of like grade and quality for use and consumption in Cache County, Utah, on or about March or April, 1964, when it sold ten lanes and pinsetters for \$81,118.56 or an approximate price of \$8,111.86 per lane and the appellee at a lower and discriminating price sold and continues to sell snooker and billiard tables and other equipment to the said Utah State Building Board or others for use in competition with the appellant in Cache County, Utah (Par 13-9, R 49).

That the property and commodities so sold to the Utah State Building Board by Appellee were sold for the purpose and use in competition with the appellant and were to be and have since the fall of 1964 been used in competition with the appellant.

On the major sale there was an unlawful price discrimination practiced by the appellee against the appellant of \$4,980.00 per lane or a total of \$79,680.00 as applied to the sixteen lanes of appellant (Par 13, R 49). From at least October 5, 1960, and at all times since and at the present time the appellee continued and does continue up to the present time to discriminate against the appellant by selling to competition of appellant any and all bowling equipment and other commodities on the discount basis of from 17% to 25%.

That as a result of the unlawful discrimination in prices the appellant has been and is unable to successfully compete with the competitor lanes enjoying the lower prices as granted by appellee in Cache County, Utah, and appellant must charge a higher per line cost to each bowler than its competitor; and, the competitor due to the unlawful price discrimination has secured its lanes, pinsetters, and other equipment at a reduced price and as a result charges its customers, the bowling public in the area of Cache County, approximately 17% to just over 22% less than appellant though each provide the same facilities (Par 11, R 46-47). As an obvious and direct consequence of such discrimination practiced by appellee such competition of appellant would be expected to and does charge lower prices to customers than appellant can afford to charge or be expected to charge customers (Par 11, R 47).

After appellant originally acquired equipment and other commodities from appellee, the appellant has been allowed to and has purchased commodities from appellee but only at a higher price for such commodities than the appellee charges the competitor of appellant and the appellee did not make the same lower price available to appellant as it has made available for the use of such competition. The appellee reduced its prices for commodities used by the competitor of appellant while continuing to charge appellant a higher price on such commodities and without giving appellant an opportunity to purchase at the same lower price and appellee created a difference in prices for commodities of like grade and quality which prices were not available at the same time to all competing purchasers and which lower prices were not available to appellant



(Par 12, R 47). The actions of the appellee were so overt and callous in injuring the appellant in Cache County, Utah, that the appellee knew or should have known that such price discrimination and in such large percentage would not allow the appellant to compete in the area and would in fact inflict great damage on appellant and effectually force it from business because of the economic facts in the area and market covered by appellant and its competition (Par 12, R 47).

The tangible property of appellant so affected has a net cost cash value of \$300,424.17 and would have a market value, without the price discount discrimination practiced by appellee of \$200,282.78, and including good will the whole business value would be at least the sum of \$250,282.78 (Par 14, R 50).

Because of and as a result of the price discrimination illegally practiced by appellee in violation of Title 15, Sec. 13, USC, the entire value of the going business and assets of the appellant, Logan Lanes, Inc., has been reduced to and is not now over \$50,000.00 (Par 15, R 51). Because of the unlawful price discrimination appellant has been unable to pay certain required installments to appellee on a pinsetter contract and the appellee has instigated foreclosure procedures which is leading to additional expenses and damages and might well involve the entire loss of the to date investment of appellee of over \$300,424.12 together with its very valuable good will built up at great cost and time by its officers (Par 16-17, R 51-52). Demand was made under date of November 12, 1965, to the appellee to place the appellant on equal price footing with the com-



petition complained of so that an equal chance to compete would exist, and the appellee refused to do so and started the foreclosure action on the pinsetter contract after such demand (Par 18, R 50).

The questions involved arise with the court giving Judgment to the appellee based on those grounds or reasons found in its memorandum entered over date of May 26, 1966 (R 98-103). More specifically, the lower court found the principal question (R 100) is whether a sale to a sovereign renders a seller immune from actions brought pursuant to 15 USC 13 (a). The district judge held that the seller was "immune" noting that several cases "appear to stand for the proposition that the Robinson-Patman Act does not apply to sales to a sovereign" (R 100). Assuming a sale to a state is subject to the provisions of the Robinson-Patman Act then the district court stated the opinion the fact questions as to the use, class and type of goods and definition of "supplies" in exemption provided in 15 USC 13 c should be answered that "the defendant would be entitled to the exemption afforded. . . ." (R 102).

Appellant takes the position that certainly there is no "immunity" involved unless the sovereign is attempted to be made a party and that no general exemption should be afforded appellee or this course of conduct under the law; and, further the statutory 15 USC 13 c exemption is inapplicable to the facts herein or the applicability cannot and should not be determined without all of the facts being before the court as to the public use of the facilities.

### **SPECIFICATION OF ERRORS**

1. The trial court erred in entering a summary judgment in favor of appellee and against the appellant.

2. The trial court erred in considering the motion to dismiss as a motion for summary judgment.

3. The trial court erred in granting appellee's motion to dismiss whether treated as such motion or as motion for summary judgment.

4. The trial court erred in considering the question of 15 USC 13 c (52 Stat. 446) exemption of non-profit institutions either on motion to dismiss or on a motion for summary judgment as genuine questions of material fact exist and were raised.

5. The trial court erred, when considering the position of appellee on the said 15 USC 13 c exemption, to include in his function deciding an issue of fact as he should have determined only whether there is an issue of fact to be tried.

6. That the Amended Complaint states a cause of action under the antitrust laws of the United States and genuine issues of fact exist as to whether appellee is or is not entitled to the benefit of exemption as provided in Title 15, USCA, Sec 13 c, and that the trial court erred in holding the sales of appellee and the transactions sued upon immune from an action under the Robinson-Patman Act.

7. That the Judgment entered by the court is against the law governing the facts and the parties and abridges the right of appellant to trial, right to discovery and a right

to have all the facts weighed before legal consequences are determined.

8. That the trial court erred in granting appellee's motion for extension of time.

9. That the trial court erred in denying appellant's Motion for Order Compelling the appellee to answer Interrogatories.

10. That the trial court erred if it did not deem each admission requested by appellant as an admission made by appellee.

11. That the trial court erred in not ordering stricken or ignoring appellee's Motion for Extension of Time which motion was made after Stipulation and after Order entered of February 15, 1966.

12. That the trial court erred in prematurely frustrating discovery efforts of appellant.

## ARGUMENT

### Summary

The amended complaint in this cause states a claim for relief alleging facts showing a violation of 15 USC 13, the Robinson-Patman Act. Brunswick Corporation is not entitled to the benefit of any immunity enjoyed by the State of Utah. The federal antitrust legislation preempts the field and Congress intended to exercise the commerce power under the federal constitution to its full extent and in this intention included all activities within the United States in buying and selling commodities to be used competitively in a market area. There is no implied exemption in sales to the several states, and the common law rule that a sovereign authority impliedly intends not to be bound by its own legislation which tends to restrict or diminish its power, right or interest, unless expressly stated, refers to an exemption of the enacting sovereign and should not be extended to any other "sovereign". The genesis of the attorney general opinions on sovereign exemption is based upon a rule of construction affecting only the enacting sovereign and not other "sovereigns". No basis for applying non-profit institution exemption has been sufficiently laid in the facts before the court or a genuine issue on material facts exists precluding granting summary judgment. The district court should follow the federal rules of civil procedure as supplemented by local rules, and should not invent or allow the parties to assert wholly different procedures than those set by rule. The judgment below should be reversed.

The holding of the judge below as disclosed by the Memorandum Opinion (R 98-103) is essentially founded on two asserted exemptions: the first is asserted by citing three cases and distinguishing one case and the other is based on a statutory exemption. This brief covers each

of these points and for purposes of illustrating legislative intent first considers the statute and background law. Because of the reliance upon certain specific authorities in the Memorandum, we shall consider each of these in detail.

### **Preliminary Consideration of Statute**

The Robinson-Patman Act amendment to ~~the~~ Clayton Act is an inclusive general policy statement being self-contained in both the prohibited acts, possible defenses and even as to evidentiary and procedural matters. The Act and the intent of the Act is to set out activities which are prohibited and listing specifically all possible defenses and the procedural handling in creating a *prima facie* case and establishing the defenses. It should be pointed out that while the plaintiff relies most heavily on 15 USC 13 (a) it is also bringing its action under all of Section 13 including 13 (c), 13 (d) and 13 (e) as the latter might bear on the acts complained of or at the least as important in clearly showing Congressional intent to rid the marketplace of all price discrimination. (f) is not relevant.

We set out 13 (a) and (b) in full and (c), (d) and (e) in skeletal form with our italics, as follows:

#### **DISCRIMINATION IN PRICE, SERVICES, OR FACILITIES—PRICE: SELECTION OF CUSTOMERS**

“(a) It shall be unlawful for *any person* engaged in commerce, in the course of such commerce, either directly or indirectly, to *discriminate in price* between *different purchasers of commodities* of like grade and quality, where either or any of the purchases involved



in such discrimination are in commerce, where such commodities are *sold for use, consumption or resale within* the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent *competition*, with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce: and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, that nothing herein contained shall prevent price changes from time to time wherein response to changing conditions

affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

### BURDEN OF REBUTTING PRIMA FACIE CASE OF DISCRIMINATION

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person . . . to pay or grant . . . any allowance or discount in lieu thereof [anything of value as compensation], except for services rendered in connection with the sale or purchase of goods . . ., either to the other party to such transaction or to an agent . . ., or other intermediary therein where such intermediary is acting in fact for or in behalf, . . . of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person . . . to pay or contract for the payment of anything of value to or for the benefit of the customer of such person . . . in consideration for any . . . facilities furnished . . . in connection with the processing, handling, sale or offering for sale of any product . . . manufactured, sold or offered for sale by such person, *unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodity.*

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale . . . *upon terms not accorded to all purchasers on proportionately equal terms."*

The above legislation making it unlawful for a seller to practice price discrimination is constitutional.

*Atlas Bldg. Products v. Diamond Block*, 269 F 2d 950, cert. den. 363 US 843, 80 S Ct. 1608, 4 L ed 2d 1727.

*Elizabeth Arden v. F.T.C.*, 156 F 2d 132.

The purpose of these sections was to protect customers from and prevent price differentials except those based in full on cost savings.

*Forster Mfg. v. F.T.C.*, 335 F 2d 47.

*Tri Valley Packing v. F.T.C.*, (9th Cir) 329 F 2d 694.

There is no doubt that Section 1 of the Clayton Act 15 USC 15, defines all portions of 15 USC 13 relevant to this suit as part of the antitrust laws and violation thereof amenable to treble damages.

*New Jersey Wood Furnishing Co. v. Minnesota Min. & Mfg. Co.*, 332 F 2d 346, affirmed 85 S Ct 1473, 381 US 311, 14 L ed 2d 405

*Monarch Life Ins. Co. v. Loyal Protectors Life Ins. Co.*, 326 F 2d 841, cert. den. 84 S Ct 968, 376 US 952, 11 L ed 2d 971.

If the price difference complained of violates 15 USC 13, the plaintiff is entitled to treble damages regardless of whether there is a public injury and the civil remedy is not limited to competitors of the buyer.

*Kentucky-Tennessee Light & Power v. Nashville Coal*, 37 F Supp 728.

*Normand v. 20th Century Fox*, 37 F Supp 649.

*Simpson v. Union Oil*, 84 S Ct 1051, 377 US 13, 12 L ed 2d 98.

*Ames v. Bostitch*, 240 F Supp 521.

*In re McConnell*, 82 S Ct 1288, 370 US 230.

*Mead's Fine Bread v. Moore*, 208 F 2d 777.

Congress was anxious to assure that no price discrimination occur in the American market place and all customers using a product in competition receive proportionately equal terms even to the extent of precluding allowances which might be used to disguise a price differential as said in Senate Report No. 1502 in H.R. No. 2287, 74th Congress, 2d Sess:

"Sections (c) and (d) of the bill addressed this by prohibiting the granting of such allowances, either in the form of services or facilities themselves furnished by the seller to the buyer, or in the form of payment

for such services or facilities when undertaken by the buyer except when accorded or made available to all competing customers on proportionately equal terms."

Congressman Utterback, Chairman of the House Conference, explains Sections (d) and (e), as contained in the final bill, in part as follows:

"The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, were made intentionally broader than this one sphere, in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities, where furnished 'in connection with the processing, handling, sale, or offering for sale' of the product concerned." 80 Cong. Rec. 9418.

The instant cause involves a discrimination among purchasers in which the product of heavy equipment, pin-setters and bowling lanes, are used competitively. The equipment is used competitively as the bowling public pays a fee for the use. Of course, no "resale" is necessary under 13 (a), only (d) and (e). (a) involves either "use, consumption or resale within the United States."

One of the discussions of price discrimination under the Robinson-Patman Act is:

Second Revised Edition, Price Discrimination and Related Problems under the Robinson-Patman Act, the Joint



Committee on Continuing Legal Education of the ALI and ABA, Cyrus Austin, 1959.

We quote from this summary of both congressional intent and decided cases as it will indicate we feel compellingly that the appellant has stated a claim for relief and the appellee was not entitled to judgment on the record.

"The Robinson-Patman Act (49 Stat. 1526, 15 USC 13) is a federal statute, enacted June 19, 1936, having for its purpose the prevention of discriminations in price and other discriminatory practices injuriously affecting free competitive enterprise. It was designed to afford protection against those practices to individual competitors at all levels of competition; to preserve competition generally and protect small business in particular.

"The Robinson-Patman Act contains four sections, Section 1 amended Section 2 of the Clayton Act by enlarging it into six subsections numbered 2(a) to 2(f). These six subsections numbered contain the federal law of price discrimination as administered and enforced in civil proceedings by the Federal Trade Commission and by the courts.

"Section 2(a) corresponds to old Section 2 of the Clayton Act. It materially amends and extends the prohibitions and provisos of old Section 2, but it remains the basic section prohibiting direct and indirect discriminations in price having any of the specified effects on competition. Certain affirmative defenses are permitted by the provisos, notably the justification of price differentials by differences in seller's costs.

"Section 2(b), 2(c), 2(d), 2(e) and 2(f) are new sections having no counterpart in old Section 2 of the Clayton Act, except that the 'meeting competition' proviso of old Section 2 is transferred in materially changed form to Section 2(b).

"Sections 2(c), 2(d) and 2(e) are designed to bring price discriminations into the open by absolutely prohibiting certain discriminations not directly reflected in price but which were found by Congress to have been commonly engaged in for the purpose or with the result of giving a competitive advantage to large buyers through preferential private arrangements and supplemental benefits not made available to the rank and file of small customers." Austin, pp 1-2.

"In reporting the bill favorably the Senate and House Committees emphasized the purpose to protect the competitive opportunity of the small business man by prohibiting all price differentials except those which could be justified by cost savings." Austin, p. 10.

The purposes of the bill were summarized in the Conference Report as follows:

"The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them. Such discriminations are sometimes effected directly in prices, including terms of sale; and sometimes by separate allowances to favorite customers for purported services or other considerations which are unjustly discriminatory in their results against other customers." H.R. Rep. 2951, 74th Cong., 2d Sess. 1936.

"The most frequently quoted definition of 'discrimination' as used in the Robinson-Patman Act is that given by Congressman Utterback, manager of the Conference Bill, on the floor of the House during debate on the bill:

'In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in the resale of the goods concerned, that relationship exists. Where, also, the price to one is so low as to involve a sacrifice of some part of the seller's necessary costs and profit as applied to that business, it leaves that deficit inevitably to be made up in higher prices to his other customers; and there, too, a relationship may exist upon which to base the charge of discrimination.'

"The primary meaning of discrimination is a difference or distinction in treatment (Webster). It is in this primary sense that the terms 'discriminate' and 'discrimination' are used in Section 2(a), not in the secondary and more common sense of an unfair or unjust difference in treatment. This is true because Section 2(a) prescribes its own tests of what differences in price treatment are unfair or unjust. Unequal price treatment which may have any of the stated effects on competition, and otherwise falls within the affirmative prohibitions of Section 2(a), is a discrimination in price within the meaning of that section and is unlawful unless it can be justified by cost differences or otherwise." Austin, pp. 18-19.

Several meanings have been given to the word "discrimination" and again quoting from Austin:

"Discrimination in price under Section 2(a) means more than a difference in prices only in the respect that unequal price treatment implies lack of availability of the lower price to purchasers paying the higher price." P. 21.

"The significance of the added words, lies in the protection they afford to *individual customers* of the seller by limiting the scope of the competition which need be considered to competition with a single favored purchaser. Such provision, intended to reach discriminatory practices resulting in injury to the competitive opportunity of one or a few individuals, as distinguished from competition generally, was entirely new to our antitrust legislation."

Judge Woodbury in *Forster Manufacturing Co. v. F.T.C.*, 338 F 2d 47, cert. den. 380 US 906, noted that it appeared obvious that competitive opportunities were injured when one customer has to pay higher prices than a competitor, making it enough in showing a violation if it is reasonably possible that price discrimination may have such an effect. *F.T.C. v. Morton Salt Co.*, 334 US 37, 68 S Ct 335, 92 L ed 1196.

Analogously, the Dayco Corp. statement by Chairman Dixon that "*lower prices are not 'available' where a purchaser must alter his purchasing status before he can receive them*" indicates somewhat the involvement here. See also William H. Rorer, Inc., Trade Reg. Rep., Sec. 17, 264 (FTC docket 8599, 1965).

Naturally discrimination in price means difference in price.

*Loren Specialty Mfg. Co. v. Clark Mfg. Co.*, 241 F Supp 493.

*Shore Gas & Oil v. Humble Oil*, 224 F Supp 922.

A discrimination occurs where there has been two actual sales at a different price to two different actual buyers.

*Jones v. Netzger Dewies*, 334 F 2d 919.

*Nat'l Dairy Products*, 309 F 2d 943.

*Valesco Products v. Lloyd A. Fry Roofing Co.*, 346 F 2d 661.

The proof necessary to make a *prima facie* secondary line case, now before the court, in violation of 2 (a), is jurisdiction, commerce, discrimination in price, goods sold at both the higher and lower price for use, consumption or resale within the United States and a buyer affected competitively.

*Enterprise Industries v. Texas Co.*, 240 F 2d 457, cert. den. 353 US 965.

As said in the earlier case of *Moss, Inc. v. F.T.C.*, 148 F 2d 373, cert. den. 326 US 734:

"Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result."

This is the interpretation expressed in two U. S. Supreme Court cases: *F.T.C. v. Cement Institute*, 333 US 683, 721, 68 S Ct. 793, 92 L ed 1009, and *Morton Salt*, above, 334 US at pp. 45-50; the court in *Cement Institute* providing that:



"Sec. 2(b) provides that proof of discrimination in price (selling the same kind of goods cheaper to one purchaser than to another) makes out a prima facie case of violation. . . ."

See also: 1 ALR 2d 267

*Hershel Val. Fruit Products v. Hunt Foods*, 221 F 2d 797.

### **Governmental Immunity or Exemption Raised Below**

Congress saw fit through express statutory exemption to remove certain purchases and certain sales from the Robinson-Patman Act. These statutory exemptions are pointed and direct and one (15 USC 13 c) is involved in this suit. The intent of Congress to exempt by statute and to include all discriminations not so statutorily exempted is thus most manifest. The Congressional Committee hearings produced the clear aim that the area of applicability of the Act related to all competitive situations and non-applicability related to non-competitive situations. Not citing an appellate opinion upholding its contention but relying on three district court discussions the earliest of which stresses an Attorney General's opinion to the effect an enacting sovereign, the federal government, does not intend to have its legislative acts divest its present existing rights without clear words of such intent, the court below stretched this to a broader "exemption" affecting those dealing with foreign "sovereigns". We submit this the Act does not do; this Congress did not intend.

*United States v. Singer Mfg. Co.*, 83 S Ct 1773, 374 US 174, 10 L ed 2d 823.

The District Court held with the assertion of appellee in its briefs below that congress did not intend to exercise its full commerce power to include sales to states, but rather intended by implication, not found in the wording of the act, to restrict or limit federal antitrust laws to render a seiler immune from Robinson-Patman Act discriminatory price violations when dealing, not just with the federal government, the enacting sovereign, but with any sovereign state. This implied intent, again not found in the wording of the act, was asserted by appellee in brief below: "Under these circumstances by virtue of the participation of the sovereign in the transaction, which is authorized and regulated by state statutes, the federal antitrust laws are inapplicable."

We thus start our analysis by first considering the intended extent of coverage of the antitrust laws as judicially determined by past appellate court rulings.

Congress in passing the antitrust laws left *no area* of its constitutional power unoccupied; it "exercised all the power it possessed"; or, differently put, congress in the antitrust laws meant to and did exercise the full extent of its commerce power granted by the constitution.

*Trans-Missouri Freight Case*, 17 S Ct 540, 166 US 290, 41 L ed 1007.

*United States v. Frankfort Distilleries*, 65 S Ct 661, 324 US 293, 89 L ed 951.

*United States v. Union Pacific*, 226 US 61, 33 S Ct 53, 57 L ed 124.

*United States v. Southeastern Underwriters Association*, 64 S Ct 1162, 322 US 533, 88 L ed 1440.

*Standard Oil of New Jersey v. United States*, 31 S Ct 502, 221 US 1, 55 L ed 619.

*Chattanooga Foundry & Pipe Works v. City of Atlanta*, 27 S Ct 65, 206 US 390, 51 L ed 241.

*United States v. American Tobacco*, 221 US 106, 31 S Ct 632, 55 L ed 663.

*Marriott Hotels v. Heart of Atlanta Hotel*, 232 F Supp 270.

This recognition of the intent of congress to completely exercise the power derived from Article I, Section 8, Clause 3 of the Constitution of the United States has been recognized from the first cases construing the anti-trust laws to the present. This circuit recognizes such intent and the federal preemption over the objects covered. In the cause of *United States v. Chrysler Corp. Parts Wholesalers*, 180 F 2d 557, 559 (9th Cir 1950), this court after first dogmatically stating the proposition on page 559, then again noted such intent in stating:

"It is well established that the commerce power of Congress, and the Sherman Act, *which is a complete exercise of that power*, extends to intrastate transactions which substantially affect interstate commerce. *Mandeville Island Farms Inc. v. American Crystal Sugar Co.*, 334 US 219, 68 S Ct 996, 92 L ed 1328.

\* \* \*

"Restraints on retail sales of goods within a state which were purchased outside the state have been held to so affect interstate commerce as to be within the scope of the commerce power and the Sherman Act. *United States v. General Motors*, 7 Cir, 212 F 2d 376, 401-402; cf., *N.L.R.B. v. Van De Kamp's*, 9 Cir,

152 F 2d 818. 'The control of the handling, the sales and the prices at the place of origin \* \* \* or in the state of destination \* \* \* may operate directly to restrain and monopolize interstate commerce' Local 167 v. United States, 291 US 293, 297, 54 S Ct 396, 398, 78 L ed 804." [our italics]

Las Vegas Merchant Plumbers v. United States. (9 Cir 1954) 210 F 2d 732, 739-740, noted:

"In the enactment of the Sherman Act Congress exercised *its full power over interstate commerce*. . . . [cases cited]"

"The Sherman Act therefore extends not only to transactions in the stream of interstate commerce, but also to intrastate transactions which substantially affect interstate commerce. . . . [Cases cited]" [our italics]

The commerce power so intended to be fully exercised is, indeed, today very broad.

*Heart of Atlanta Motel v. United States*, 85 S Ct . . .  
13 L ed 2d 12.

*Standard Oil v. FTC*, 173 F 2d 210, 214, 340 US 231,  
236-238, 71 S Ct 240, 95 L ed 239.

*Harf v. United States*, 235 F 2d 710, 718.

*Hostetter v. Idlewild*, 377 US 324, 84 S Ct 1293, 12  
L ed 2d 350.

*Collins v. Yosemite Park Co.*, 304 US 518, 58 S Ct  
1009, 82 L ed 1502.

*SEC v. Chenery*, 188 F 2d 100, 87 F Supp 289, cert.  
den. 341 US 953, 71 S Ct 1018, 95 L ed 1375.

*Wickard v. Filburn*, 317 US 111, 63 S Ct 82, 87 L ed  
122.

Had it not been for observations in several attorney general opinions in the 1930's and dictum in three *nisi prius* cases, some years back, there would be no doubt but that Congress intended to and did in fully exercised its federal commerce powers embrace the several states in included prohibitions covered in the antitrust laws. In doing so an invasion of states' rights has not occurred.

See Liquor cases, hereafter.

Commerce Clause, Article I, Sec. 8, Constitution of the United States.

Article IV, Sec. 2, Constitution of the United States.

Article V, Constitution of the United States.

When Congress has entered the field enacting legislation affecting interstate commerce all inconsistent state legislation is superceded.

*Illinois Natural Gas Co. v. Central Illinois Pub. Serv. Co.*, 314 US 498, 86 L ed 371, 62 S Ct 384.

*Cloverleaf Butter Co. v. Patterson*, 315 US 148, 86 L ed 754, 62 S Ct 481.

The same is true when a state act or statute although not in express conflict nevertheless stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

*Hines v. Davidowitz*, 312 US 52, 85 L ed 581, 61 S Ct 399.

The act in its own words clearly does not include a governmental exemption, and when unambiguous effect should be given to what the statute plainly intends by reference to what it says:



Holmes, Collected Legal Papers 207.

*Soon Hing v. Crowley*, 113 US 703, 710, 711, 58 S Ct 730, 28 L ed 1145, 1147.

The definitions of "person" and of "commerce" indicate the entities covered and activity embraced in the antitrust laws.

15 USC 12, *inter alia*, defines "person" and also "commerce":

" 'Commerce', as used herein, *means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: Provided, that nothing in this Act contained shall apply to the Philippine Islands.*

"The word 'person' or 'persons' *wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.*" (Our italics).

The states have been held to be "persons" in the meaning of the antitrust definitions:

*Georgia v. Evans*, 62 S Ct 972, 316 US 159, 86 L ed 1346.

*Georgia v. Pennsylvania Railroad*, 65 S Ct 716, 324 US 439, 89 L ed 1015.

*Illinois v. Brunswick Corporation*, (1963) 32 FRD 453.

*California v. Brunswick*, 32 FRD 36.

The cities of a state are "persons".

*Chattanooga Foundry & Pipe Works v. City of Atlanta*, 27 S Ct 65, 203 US 390, 15 L ed 241.

### **Immunity and Cases Cited by Trial Judge**

Under acts such as the federal Robinson-Patman Act the federal government unless it waives the advantage might be immune from private action, but in application of the federal law, the cases show no immunity of the several states in light of federal pre-emption. Indeed, the constitutional standards of equal protection and due process might well preclude legislation allowing each state to in effect take property of a private firm without compensation by the device of allowing the state to exempt sellers from coverage. Art. IV and Amendment 14, Constitution of the United States.

The appellant suggests, with the possible exception of sales to the enacting sovereign which in this case is the federal government, the intent shown is full coverage of all but plain statutory exemptions and the rationale of any exclusion of a state or others alike is keyed to buyers competing in a market. For this reason and this reason only government purchases at a lower price than to others where no competing purchaser is affected are excluded. It is incorrect to assert the Act does not apply to a transaction in which any "sovereign" is involved or that such

transactions are exempt. The intent expressed in the act is only that the discrimination must occur within the United States. The inquiry of immunity is irrelevant unless a sovereign itself is sought to be held. No sovereign is sued in this case. While the states might enjoy the benefits of the doctrine of sovereign immunity (subject to congressional action regulating commerce) and under this doctrine remain unsusceptible to suit certainly a private seller is not so exempted in a violation of the antitrust laws. State involvement does not protect a private corporation by making an illegal act legal.

Utah did not authorize or attempt to authorize Brunswick to violate the federal act. The state did not tell Brunswick how much to bid or to bid or sell lower for student union facilities than Brunswick sold or was selling to other buyers competing in the bowling business in Cache County. The defense is similar to that submitted by the railroad carriers and rejected by the Supreme Court in *United States v. Trans-Missouri Freight Association*, 166 US 318, 17 S Ct. 518, 41 L ed 1019. In that case an exemption by implication was urged because of the commerce act and here Brunswick urges such because of the state involvement.

As to regulation of interstate commerce the states submitted to federal control and so waived immunity in this and other areas of federal pre-emption when the constitution was ratified and adopted or when admitted into the union.

The proprietary function or governmental function conventionally used in determining the immunity of states

and municipalities is not really directly applicable as the immunity question itself is not involved unless a sovereign or its instrumentality is sued. The distinction is useful only as an equation in the Robinson-Patman applications since the federal legislation pre-empts the field. Exclusion of sales to state agencies is not because of any exemption or immunity, but because there is a violation of the law only when the property sold in the market place is used in competition with another buyer. Competition was the rationale repeatedly used at the congressional hearings. The philosophy of the act is that goods should not be sold in the market place to private persons, states or state agencies at a discriminatingly low price whenever that property is to be used in competition with another buyer who is buying and using such like property in competition with that of the buyer receiving a discriminatory price. We have found no statement at Congressional hearing or appellate court level inconsistent with this basic intent and purpose. Actually, for this reason, many commodities purchased by states or municipalities (not through exemptions or immunities, but because the very purpose of the governmental function in purchase is not in competition in any market) might well appropriately be sold without violating Robinson-Patman. In fact, as in other areas of government purchase, a seller can always request a statement from a state or municipality or governmental agency that the article purchased is neither intended nor to be used in proprietary competitive functions or in commerce and competitive commercial endeavors. This procedure is not without precedent to avoid

the impact of tax or police regulations imposed on commercial transactions.

The most recent case decided and cited by the court below considers *sales to the federal government*. *Sperry Rand Corp. v. Nassau Research and Dev. Assoc.*, 152 F Supp 91. With preliminary reference to the short disclaimer (which did not change the result of the opinion) on page 96, the following quotation on basic rationale is made from page 95 of this 1957 opinion:

"The plaintiff urges that a sale to the United States Government does not fall within the scope of the Robinson-Patman Act, but cites no cases in which it has been held that sales to the Government fall outside the above quoted provision; and the contrary to that position seems to be stated in *A. J. Goodman & Son v. United Lacquer Mfg. Corp.*, DC 81 F Supp 890, on page 893, from which the following quotation is pertinent:

'The complaint sets forth sufficient facts to show that plaintiff and defendant were competitors, since they were rivals for the business of selling lacquer to the State of New Hampshire. It describes the basic facts of an alleged course of conduct by defendant which might on further proof justify a finding that defendant acted for the purpose of eliminating plaintiff as a competitor. Nor can I hold, in the absence of further evidence, that the price of \$1.75 was not unreasonably low. Consequently, I hold that on this point, the complaint properly alleges a violation of Sec. 13a.' [Note: 13a, the Borah-Van Nuys bill, is not 13 (a), part of the amended Patman bill affecting 2 (a) of the



Clayton Act, the former requirements as to effect on competition not being involved in the 13 (a) discrimination proof.]

"A recent discussion of this statute will be found in *Moore v. Mead's Fine Bread Co.*, 348 US 115, 75 S Ct 148, 99 L ed 145. This was a case in which the defendant was charged with having cut prices in intrastate transactions and driving competition out of business, and the court discusses the different prices quoted by the defendant in its intra as distinguished from its inter state business. In reversing a decree for the respondent, the court uses this language at page 120 of 348 US, at page 151 of 75 S Ct:

'It is, we think clear that Congress by the Clayton Act and Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent.'

"As to the right of private litigant to recover damages under the quoted Section, see *Vance v. Safeway Stores, Inc.*, 10 Cir. 239 F 2d 144, at page 146.

"Without unnecessarily prolonging this opinion, it will suffice to state that the defendants' amended pleading as to these challenged paragraphs cannot be held to be deficient as a matter of law, and consequently as to them the motion to dismiss as a counter claim will be denied."

The comments made by Judge Thompson in *Sterling Nelson & Sons, Inc. v. Rangen, Inc.*, 235 F Supp 393 (both the case here under consideration and that cause being concerned with the Robinson-Patman Act statutory additions to the Clayton Act, although Rangen specifically involved 15 USC 13 (c) rather than 13 (a)), bear on the contention

of appellee that the antitrust laws do not apply with respect to sales to sovereigns. The exact language of Judge Thompson found on page 399 is:

“Defendants also argue that the antitrust laws do not apply with respect to sales to a sovereign state. We do not agree. The only purpose of such an exception of which we can conceive is to preserve the right of a sovereign to purchase goods as cheaply as possible irrespective of the price to private customers. No problem of this sort is involved here. If we have correctly interpreted Section 13 (c) as an express prohibition of commercial bribery no reason occurs to us why such misconduct should not be actionable with respect to sales to a sovereign as well as sales to a private citizen or corporation. Compare: *Union Carbide and Carbon Corporation v. Nisely*, (10 CCA 1962) 300 F 2d 561; *Bankers Life & Casualty Co. v. Larson*, (5 CCA 1958) 257 F 2d 377; *Pfotzer v. Aqua Systems*, (2 CCA 1947) 162 F 2d 779.”

The implication by this circuit in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F 2d 851, points to a reserved doubt of such exemption as urged by appellee. Of course, nothing prevented, at any time in its sales to the State of Utah, or for that matter to any other person or entity, the appellee, Brunswick, from giving equal price consideration to the appellant and others. Brunswick is free to charge as low a price as it wishes, so long as the prices it charges in a competitive market place whether to a state or other private party or entity, are not discriminatory, that is, not less to one than to another. The federal act precludes the discrimination.

A third case cited by the court below, *General Shale Products Corp. v. Struck Construction Co.*, 37 F Supp 598, states rather dogmatically that the power of Congress in this field is plenary. Actually, the court in *Shale* had some difficulty in 1941 with the then contemporary cases interpreting the Commerce clause power, five years after enactment of the Robinson-Patman Act. The opinion is of interesting historical value and the court reasoned that a construction company incorporated under Kentucky law and qualified to carry on business in other states when entering into a contract with the City of Louisville Municipal Housing Commission for clearance of a slum was engaged in interstate commerce in contemplation of Robinson-Patman price discrimination and that the Robinson-Patman Act applies to commercial sales on the part of those who deal in a commodity although the court held, under the facts then before it, the purchasers were not in that situation in *competition with each other*. The purchaser discriminated against was not in competition with those receiving favorable treatment. The basis of the lower court's dictum that the Act did not apply to certain sales to the government, states or municipalities, was based on the analysis:

"Accordingly, selling at a reduced price is not illegal *unless it is made for the purpose of discriminating between competitive buyers.*" (Our italics).

*General Shale* was affirmed on grounds not related to any purported exemption or the contention as relied on by appellant, but on the completely unrelated ground that the purchasers were not competing for the same

market. Thus, *General Shale* established no other principle than that in which the district court was upheld on appeal.

This early opinion confuses somewhat the proof requirements involved in first line and secondary line competition which in the embryo development of the act's philosophy certainly is understandable. The court noted by way of passing a quotation from Attorney General Cummings relying on *Dollar Savings Bank v. United States*, 22 L ed 80, that when a sovereign passed a law it will be assumed not to apply to that sovereign, this, as the court indicated, being left over from the old English principle: "It is a familiar principle that the king is not bound by any act of Parliament unless he be named therein by special and particular words." The executive is not bound by acts of the federal legislature unless the federal legislature specifically so indicates. We would submit there is error in construing this further than that indicated, and that the court correctly having stated the rule of federal pre-emption in interstate commerce should have logically concluded that unless Congress specifically so provide the actions of the states themselves would be included and most assuredly the act will govern the activity of others with whom the state commercially deals. The court noted the Attorney General of California issued an opinion contrary to state exemption even at that early date. It is a judicial rule that in construing a legislative enactment before the judiciary will feel authorized to put an interpretation upon a statute to restrict or diminish the rights of the government it must be clear that the legislature so

intended the enacting sovereign itself to be bound. We do not now brief the obvious but unrelated point that because of the position of the federal government this rule of construction might be justified in the interpretation of the legislative acts of a state for federal protection, but obviously the rationale of the many supreme court decisions compel the reverse is certainly not true.

The District Court's last case authority was *Sachs v. Brown-Forman*, 134 F Supp 9, wherein the court noted by way of passing that there was some doubt as to Robinson-Patman application on a sale to state or federal government agencies. Such observation in the 1955 decision, involving the OPA ceiling prices and the old wartime acts, in view of subsequent supreme court decisions is hardly of compelling significance today.

The limited effect of state action on the thrust of the federal antitrust laws, however, is dramatized in the area of liquor control considered in *Sachs*—a field in which a state is unconfined by traditional commerce clause limitations “when it restricts the importation of intoxicants destined for use within its borders.” Even with the express constitutional grant of state authority restricting federal intervention, we have this expression from the United States Supreme Court in *Nippert v. Richmond*, 327 US 416, 66 S Ct 590, 90 L ed 760:

“Thus even the commerce in intoxicating liquors, over which the Twenty First Amendment gives the states the highest degree of control is not altogether beyond the reach of the federal commerce power, at any rate when the states’ regulation squarely conflicts with



regulations imposed by Congress governing interstate trade or traffic.”

Also see: *United States v. Frankfort Distilleries*, 65 S Ct 661, 324 US 293, 89 L ed 951.

*Joseph E. Seagram & Sons, Inc. v. Donald S. Hostetter*, 86 S Ct 1259, 15 L ed 2d 336.

*Hostetter v. Idlewild Liquor Corporation*, 377 US 324, 84 S Ct 1293, 12 L ed 2d 350.

When specifically discussing the Robinson-Patman Act and antitrust laws, the court in *Seagram* said:

“In this as in other areas of coincident federal and state regulations, the ‘teaching of this Court’s decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exist. . . .’ We find no such law conflict in the present case. The bare assembly without more, of price information on sales to wholesalers and retailers to support the affirmation filed . . . would not of itself violate the Sherman Act.

“We cannot presume that the Authority will not exercise that discretion, to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or other federal statutes.”

Even in light of the specific allowance of state enabling legislation the federal act so completely pre-empts the field that the exemption has been strictly confined consistent with federal antitrust policies.

*Schwegmann Bros. v. Calvert Distillers Corp.*, 341 US 384, 95 L ed 1035, 71 S Ct 745.

As said by the majority in *Schwegmann* "the fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress."

Certainly even if Utah is immune itself from suit it is not a necessary party, and a cause based on Robinson-Patman price discrimination may be maintained against one or several, the discriminating seller or the benefited buyer or both at the option of a harmed buyer.

*Nat'l Wrestling Alliance v. Myers*, 325 F 2d 768.

*Kainz v. Anheuser-Busch*, 194 F 2d 737.

*Krosch v. Texas Co.*, 167 F Supp 947.

The decided cases certainly give no credence to extending civil suit immunity of a sovereign to those with whom the sovereign bargains or bids or others with whom a sovereign might deal in violation of antitrust laws.

*Union Carbide and Carbon v. Nisely*, 300 F 2d 561.

*A. J. Goodman & Son v. United Lacquer Mfg. Corp.*,  
81 F Supp 890.

Does appellee contend that a state can by its statutes, contracts or actions authorize rebates from a railroad to an oil company, preferences, discrimination, pooling, individuals to contract with each other or with it to restrain trade and suppress competition? Or that such activity by a private corporation will be protected if a state either regulates the field or gains by contracting for the rebate or preference?

Knowledge or acquiescence of government officials in wrongdoing will not give validity or legality to acts in violation of the antitrust laws.

*United States v. Socony Vacuum Co.*, 310 US 150, 60 S Ct 811, 84 L ed 1129.

cf *Ex Parte Young*, 209 US 123, 28 S Ct 441, 52 L ed 714.

cf *Worcester County Trust Co. v. Riley*, 302 US 292, 58 S Ct 185, 82 L ed 208.

Utah, its Building Board, the University, or the Student Union Association are not necessary parties.

*American Can Co. v. Bruce's Juices*, 87 F Supp 985; 187 F 2d 919 (5th Cir.); also: 190 F 2d 73.

*Bruce's Juices v. American Can Co.*, 330 US 743, 757, 67 S Ct 1016, 91 L ed 2d 1219 (1947).

The antitrust action defined by federal statutes being a concept and claim unknown to the common law common law principles must not be applied in such actions without great caution to avoid a grotesque result.

*Philco v. R.C.A.*, 196 F Supp 155.

*Duff v. Kansas City Star*, 299 F 2d 320.

*Wheeler-Steezel Co. v. Nat'l Window Glass*, 152 Fed 364.

The historically early "commerce" restrictions on the allowable activity regulated by the antitrust laws must be considered in light of current interpretation and especially that of the years immediately past so, in spite of *Apex Hosiery* rule unions are not exempt if actually participants in aiding outside groups in violations. The indication is that any exemption in the antitrust laws are to be strictly confined even when the act involves other agencies created by the enacting sovereign.

*Las Vegas Merchant Plumbers v. United States*, 210 F 2d 732.

*United Mine Workers v. Pennington*, 381 US 657, 14 L ed 2d 626, 85 S Ct 1585.

### **Agricultural Cooperative Cases**

The lesson of the supreme court decisions in the past fifteen years is that the federal antitrust acts will apply to state activities and the federal act is not affected by state legislation. While we do not digest at all those views the appellee urged below that *Parker v. Brown*, 317 US 341, 87 L ed 315, 63 S Ct 307 (1943), through Chief Justice Stone, implied a congressional intention that a state in the federal union if a participant as an actor in an antitrust violation exempted or immunized what would otherwise be illegal, or that a state such as Utah can itself grant immunity to another such as Brunswick who violates one of the antitrust laws in dealing with the state. While the court's interpretation of the commerce power was then more restricted than presently viewed, these points were specifically noted.

"True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful *Northern Securities Co. v. United States*, 193 US 197, 332, 334-347, 48 L Ed 679, 698, 703, 704, 24 S Ct 436; and we have no questions of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade. cf *Union Pacific Railroad Co. v. United States*, 313 US 450, 85 L ed 1453, 61 S Ct 1064."

"The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. . . ." 87 L ed 326-327, 337 US 351-352.

Does not the opinion itself while conceding the power of Congress to preempt the field under the commerce clause hold the state regulations there considered were "never intended to operate by force of individual agreement or combination"? In context the language of the opinion applies only to a program policing by state regulations or state officials an industry or business. The court went out of its way to note the state would not be excluded from the anti-trust laws if it were a participant implying it would be included if itself conspiring or contracting in violation of the law.

*Parker v. Brown* must be considered in light of the decisions since that date touching upon the commerce power of Congress, which power Congress has repeatedly held to have exercised to the *full extent* in the sweep of the antitrust statutes.

In this field of agricultural cooperatives we have the expression of Judge Meredith in *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F Supp 476, that although an agricultural cooperative was made exempt from antitrust laws under sections 1 and 2 of the Capper-Volstead Act and Section 6 of the Clayton Act, the exemptions are inapplicable "to actions of an agricultural cooperative with respect to other non-cooperative corporations or individuals



and as to these an agricultural cooperative is subject to the antitrust laws the same as any other corporation or person." The FTC found much the same in *Washington Crab Association*, Trade Reg. Rep., Sec. 17,004 (F.T.C. Docket 7859, 1964) and cited: *Maryland & Virginia Milk Producers Assoc. v. United States*, 362 US 458, 80 S Ct 847, 4 L ed 2d 880 (1960). The Bergjans case cited with approval *Tillamook Cheese and Dairy Assn. v. Tillamook Co. Cream Assn.*, 358 F 2d 115, 118.

*Sunkist Growers v. Winckler & Smith*, 370 US 190, 82 S Ct 1130, 8 L ed 2d 305.

*United States v. Borden Co.*, 308 US 188, 60 S Ct 182, 84 L ed 181.

The recent cases dealing with cooperatives are more relevant in that not only is the federal exclusionary enactment applicable but all the states have apparently passed acts specifically authorizing the existence of agricultural cooperative activity.

Jensen, *The Bill of Rights of U.S. Cooperative Agriculture*, 20 *Rocky Mt L Rev* 181, 191, n 29 (1948); 38 *Harv L Rev* 87, 89 n 17 (1942).

The court in *Parker* specifically held a state could not grant immunity to those with whom it as a state might contract or participate as the federal government alone has this right to grant exceptions under its constitutional pre-emption.

Just as *United States v. Intl. Boxing Club of New York*, 348 US 236, 75 S Ct 259, 99 L ed 290, limited *Federal Baseball Club v. National League*, 259 US 200, 42 S Ct

465, 66 L ed 898, and *Toolson v. New York Yankees, Inc.*, 346 US 356, 74 S Ct 78, 99 L ed 64, strictly to baseball so, the recent cases indicate, should *Parker v. Brown* be limited strictly to regulatory activity and even there perhaps to agricultural cooperatives, and then not to exempt those with whom the cooperatives contract.

Thus, the sweep of the general statutes governing anti-trust regulation can be seen from analogous application in the unique area of state power over liquor, in the area of federal-state encouragement of agricultural coops, in the area of competing federal statutory schemes of common carriers and labor regulation. In each case the act broadly speaking applies except where plainly shown not to be intended. As observed in *United States v. International Boxing Club and United States v. Shubert*, 348 US 222, 99 L ed 279, 75 S Ct 271, when dealing with prior restrictive interpretation of a long standing act to the broadening sweep of commerce power:

"The issue confronting us is, therefore, not whether a previously granted exemption should continue, but whether an exemption should be granted in the first instance. And that issue is for Congress to resolve not this court. See *United States v. South-Eastern Underwriters Association*, 322 US 533, 88 L ed 1440, 64 S Ct 1162."

The obviously valid standard of judicial direction in such an area is found in *Gold v. Di Carlo*, 235 F Supp 817, affirm'd 380 US 520, 14 L ed 2d 266, 85 S Ct 1332:

"We would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words 'We hereby overrule *Tyson*.' . . . before recog-

nizing that the case is no longer binding precedent but simply a relic for the constitutional historians. Judges do not have such mechanical or wooden attitudes nor are they devoid of all powers of interpretation, analogy and application of constitutional principles; they and the law must keep pace with our vibrant and dynamic society and the changes in the law which the courts have pronounced."

### **Non-Profit Institution Exemption**

15 USC 13 c (May 26, 1938, c. 283, 52 Stat 446) provides:

"Nothing in sections 13-13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

A very genuine issue of material facts was meant to be raised and was raised by affidavits of appellant, although appellant had not acquired or had opportunity to acquire through depositions and discovery and use of subpoena of customers in the area at the time of hearing on motions leading to granting summary judgment a showing as to the full extent of public use of student union building facilities. Appellant did directly dispute the extent of public use alleged in the affidavits presented by appellee. Note: The Affidavit of Donald D. Kvarfordt, Exhibit 1 (R 55-57) in which he states observing the operation of the union building for five years and that it appears most probable that the records submitted by appellee do not actually separate or show student lineage from other bowling lineage, and further setting out a course of conduct indicating

that the bowling facilities have been and are used by the general public, and that, in fact, the person in charge of such facilities thought "it was too much of a job to try and identify the students and the non-students for purposes of records of charges." Other affidavits were submitted by persons not at all associated with the university who had used and observed the use of bowling facilities by the general public (R 58-64). Generally they show conclusively genuine issue of fact on the extent of public use and that the goods sold at the discriminatory prices, if considered "supplies", were not for "their own use" of the competitor but were for competitive use in serving the market in which appellant competes.

The record thus had issues of fact which preclude granting of summary judgment.

Rule 56, FRCP.

*Deterjet Corp. v. United Aircraft Corp.*, 211 F Supp 348.

*Ames v. Bostitch*, 240 F Supp 521.

*Automatic Radio v. Ford Motor*, 35 F.R.D. 198.

*Valesco Products v. Lloyd A. Fry*, 346 F 2d 661, also see 308 F 2d 383, cert. den. 83 S Ct 721. 372 US 907, 9 L ed 2d 717.

*New and Used Auto Sales v. Handa*, 245 F 2d 951.

*Sutton v. Brown*, 85 Ida 104, 375 P 2d 990.

A reading of this Statute requires a definition of "purchases" and "supplies" and in relation to the two words "their supplies" and of the words "for their own use". Naturally in the latter Congress had in mind not just "for their use" but the entire wording "for their *own* use", and,

"purchases" might imply that Congress meant not to make the exemption generally applicable to "sales to and purchases by" but only to "purchases by". The Act thus seems to be limited only to exempt the purchaser in its purchases "by" and not a seller. Appellee suggests the intent in granting the exemption only to those non-profit institutions purchasing and not exempting those selling. The wording is "to purchases . . . by schools. . . ." We could assume that the seller would remain liable in violation in case of discrimination but that qualified purchasers are exempted.

However, more compelling considerations indicate that this exemption is not involved in this case, for Congress did not provide that the exemption apply generally "to purchases by schools, colleges", but specifically added words of great limitation "of their supplies" and then further broadly limited this exemption further through the words "for their own use". It is submitted that the defendant must plead and show that the exemption as so limited is involved in this case, and this attack on motion hardly seems the office to decide this suit on this exemption involving mixed questions of law and fact. Also, the fact question is presented in which the appellee, we would submit, must show that the purchases involved were within the definition of "supplies" and were actually for and meant to be for its own use by the school involved. If the commodities purchased were not supplies then the exemption is inapplicable, and for the use of the public generally we would submit then would hardly be "for their own use" and the exemption is inapplicable. The very reason given by the Congress as to usage becomes a fact question as to



why exactly and for what purpose the purchases were involved. Also, we would submit that inherent within the definition of operating the listed institutions and then adding the words "for their own use" is meant in this case for use in carrying out the function of schooling, and certainly running a bowling alley open to the public for a valuable consideration hardly would be "for their own use".

The definition is limited to supplies, which we suggest was meant to be items of stock, materials and provisions to carry on the operation, not the purchase of capital items or major facilities for competitive use in selling services to the public.

*Student Book Company v. Washington Law Book Co.*, 232 F 2d 49, discusses the problem. The courts in cause considered the question under all the facts after trial. On appeal the court only mentioned the asserted defense in a footnote, stating:

"Appellee also argues that, even if its transactions with the campus book stores were sales, they were exempted from the application of the Robinson-Patman Act by virtue of 52 Stat. 446, 15 USC, Sec. 13 c. . . .

"Although the appellee has sold books to all three of the universities for their own use, i.e., for their libraries, the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and the books sold were not for the use of the universities but for resale at a profit. The exemption provision is therefore inapplicable to these transactions."

Was the student union self-sustaining? Were the bowling alley facilities used in the student union rented for a

profit? Were the lanes and facilities actually operated for public use at a profit? Is the student union body itself private and not charitable? Unexplained by Mr. Swenson in his affidavit for what use and purpose was the bowling alley equipment purchased? To what extent if at all, was the university involved in the operation, in the policy, in the programs, in the charges, not in the use of the building generally but in the use of the bowling alleys in the building?

Now, the present attempt of appellee to stress dismissal of the action, nipping the preliminary discovery attempted in the first set of interrogatories off at the bud becomes apparent. The appellant is entitled to all the facts, not just those the defendant has found advantageous to submit as relevant. Many fact questions are inherent in arriving at a correct conclusion. The trial court should have full benefit of all the facts. Justice requires no less.

### **Summary Judgment—Law**

The factual issues, as to whether a seller did play a "favorite" in price among two or more purchasers precludes granting either a motion to dismiss or a motion for summary judgment.

*Rayco Mfg. Co. v. Dunn*, 234 F Supp 593.

*Valesco Products v. Lloyd A. Fry*, 346 F 2d 661.

On the motion for summary judgment only the facts most favorable to appellant and the most permissible inferences from those facts may be considered.

*Warner v. Lieberman*, 154 F Supp 362.

*Golaris v. Procter and Gamble*, 153 F Supp 34.

Summary Judgment should not be granted if there is a genuine issue of any material fact, and these judgments should be issued sparingly in antitrust cases.

Rule 56 (a), FRCP.

*Potter v. Columbia Broadcasting*, 368 US 464, 82 S Ct 486, 7 L ed 2d 458.

*Leh v. General Petroleum*, (Cal 1958) 165 F Supp 933.

*Greenleaf v. Brunswick-Balke-Collender*. (Pa 1947) 79 F Supp 362.

*Automatic Radio v. Ford Motor*, (Mass 1964) 35 FRD 198.

*Moore Co. v. Richardson*, (Mo 1964) 237 F Supp 817.

*Waldron v. British Pet. Co.*, (NY 1964) 231 F Supp 72.

*Woods Exploration & Producing Co. v. Aluminum Co. of America*, (Tex 1963) 36 FRD 107.

The use of Summary Judgment in an antitrust action is discussed by Timberlake in his work "Federal Damage Antitrust Actions", Callaghan and Company, in Chapter 12. We now quote from parts of sections 12.01 through 12.03 citing the footnote cases in the text rather than in the page bottom:

"Rule 56 of the Federal Rules of Civil Procedure provides for summary judgment. 'The law is well settled that in order to entitle the moving party to summary judgment, it must be clearly shown: (1) That there is no genuine issue as to any material fact in the case; and (2) that he is entitled to a judgment in his favor as a matter of law.' (National Screen

*Service Corp. v. Poster Exchange, Inc.*, 305 F 2d 647 (5th Cir 1962).

"It is not the purpose of summary judgment to substitute trial by affidavit in lieu of a full trial and the grant of a motion for summary judgment is not appropriate when there is a bona fide dispute as to any material fact between the parties. (*National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F 2d 647, 651 (5th Cir 1962). Summary judgment should be granted only where the moving party is entitled to judgment as a matter of law, where it is quite clear where the truth is and when no genuine issue remains for trial. (*Potter v. Columbia Broadcasting System*, 368 US 464, 467, 1962; *Sartor v. Arkansas Natural Gas Corp.*, 321 US 620, 627, 1944; *Associated Press v. United States*, 326 US 1, 1945; *Eccles v. People's Bank of Lake-wood Village*, 333 US 426, 1948 . . .

"The party moving for summary judgment has the burden of demonstrating that there is no genuine issue of material fact. (*National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F 2d 647, 651 (5th Cir 1962)). Of course, affidavits filed in support of a motion for summary judgment may be considered for the purpose of ascertaining whether an issue of fact is presented, but they cannot be used as a basis for deciding the fact issue. (*Wholesale Auto Supply Co. v. Hickok Mfg. Co.*, 221 F Supp 935, 944 DNJ 1963). A grant of summary judgment will be reversed where the court draws fact inferences. (*Bragen v. Hudson County News Co. Inc.*, 287 F 2d 615, 3rd Cir 1960). It is no part of the duty of the court to decide fact issues, but only to determine whether there are fact issues to be drawn (*National Screen Service Corp. v. Poster Exchange, Inc.*, 305 F 2d 647, 651 (5th Cir 1962)).

"The trend of the courts (is) not to dispose finally of antitrust litigation upon the pleadings without giving the plaintiff full opportunity to formulate his charges (*McElhenny Co. v. Western Auto Supply Co.*, 269 F 2d 332, 339, 4th Cir 1959. In *Waldron v. British Petroleum Co., Ltd.*, 1961 Trade Cases Para 69, 978 SDNY 1961, summary judgment was denied as discovery had not been completed.) (*Smith Corona Marchant, Inc. v. American Photocopy Equipment Co.*, 217 F Supp 39, 40 SDNY 1963).

"The serious nature of the charges in antitrust cases and the fact that the proof 'will be peculiarly within the knowledge or control of the defendants' have been relied upon as reasons why the plaintiff should be granted the opportunity of proceeding with its discovery in accordance with the appropriate rules, before being foreclosed by summary judgment. (*Curto's Inc. v. Krich-New Jersey, Inc.*, 193 F Supp 235, 238 DNJ 1961. In *Castlegate, Inc. v. National Tea Co.*, 1963 Trade Cases, Para 70, 962 D Colo 1963, a motion for summary judgment was denied without prejudice to renew, even though there were many gaps in plaintiff's proof and plaintiff had many difficulties. Accord: *Philco Corp. v. Radio Corp. of America*, 34 FRD 453 ED Pa 1964).

### **Procedural Errors**

Appellant has heretofore set out in the Statement of the Case the background from which it is urged most serious and obvious error was committed by the court in denying the motion of the appellant to compel answers to interrogatories and in not considering admissions requested as deemed admitted. This is not only based on Rule 7



of the District Court (R 35) which the District Court most assuredly ignored in erroneously granting the motion of appellee but on abandoning the letter and spirit of the Federal Rules of Procedure. Reference is made to the record 40-42 containing the brief below in support of the motion to compel answers to interrogatories. Rule 33, Federal Rules of Civil Procedure, in relevant portion, provides:

"Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories *within 15 days after the service of the interrogatories*, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. *Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time.* Answers to interrogatories to which objection is made shall be deferred until the objections are determined." (our italics).

Appellant submits that the Appellee has waived any objections to the Interrogatories and must now answer same fully and completely under oath.

See cases cited: Record 41-42.

Rule 36, Federal Rules of Civil Procedure in relevant part, provides:

"REQUESTS FOR ADMISSION. After commencement of an action a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth in the request. If a plaintiff desires to serve a request within 10 days after commencement of the action leave of court, granted with or without notice, must be obtained. Copies of the documents shall be served with the request unless copies have already been furnished. *Each of the matters of which an admission is requested shall be deemed admitted unless, within a period designated in the request, not less than 10 days after service thereof or within such shorter or longer time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission of either (1) a sworn statement denying specifically the matters of which an admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part, together with a notice of hearing the objections at the earliest practicable time. If written objections to a part of the request are made, the remainder of the request shall be answered within the period designated in the request. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party deny only*

a part or a qualification of a matter of which an admission is requested, he shall specify so much of it as is true and deny only the remainder." (Our italics).

The rule seems self explanatory and appellant contends that objection must be made and actually the motion and notice timely made or there is an admission made.

*Walsh v. Connecticut Mutual Insurance Co.*, 26 F Supp 566.

*Hise v. Lockwood Grader*, 153 F Supp 276.

*Princess Pat Ltd. v. National Carload Corp.*, 223 F 2d 916.

*Creedon v. Rielly*, 8 F.R.D. 265.

*Dulansky v. Iowa-Illinois Gas and Electric*, 92 F Supp 118.

## CONCLUSION

The ominous implications suggested by the district court in his memorandum are not ominous at all in light of the congressional policy that those selling in the market place of America cannot rig or fix prices and must openly compete without discriminating in price between purchasers. What appellee argued and the court worried over are the merits of the Robinson-Patman Act, not what the act states and precludes. Whether it is a good or a bad act is not now of concern as it is and has been the governing law on interstate sales of goods consumed in America for the past thirty years.

Granting concessions or lower or favorable prices to one favored customer or group of customers on excuses

such as *public good* is a device of monopolists and as old as the practices of Standard Oil Company exposed in the first great antitrust case.

*Standard Oil of New Jersey v. United States*, 221 US 1, 31 S Ct 502, 55 L ed 619.

See also:

*Eastern Railroad v. Moller Freight*, 365 US 127, 81 S Ct 523, 5 L ed 2d 464.

We urgently stress applicability of the Robinson-Patman price discrimination prohibition applies, when dealing with buyers who are competitive, to all sellers in the American market place. Most surely did Congress intend the act reach discriminatory pricing of commodities used or consumed competitively by any purchaser, state or private. It did so to avoid all inequality derived from sheer economic power, whether that power be business or government. In light of the increased governmental activity in commercial endeavor the demand for fairness in pricing remains acute, the danger of discrimination remains even more threatening to small competing businesses. We most emphatically urge this court to allow only those exemptions specifically set out by Congress and to limit the 13 c exemption, as obviously intended, to the purchases of non-competitive "supplies". To do less is to invite the indictment of future historians, perhaps in the lifetime of our own children, that in spite of plain statutory language and legislative prohibition the courts stood by in anguished uncertainty the years small business choked through increasing death strangulation in the noose of government competition—not that fair competition allowed to all other

competitors, big or small, but unfair, evil, favored and destroying price allowances literally precluding competitive survival. The plain congressional intent to assure nondiscriminatory prices to each competitor in the market place as an aid to preserve the private enterprise system should not be judicially frustrated. To do less than fully, evenly and fairly apply the federal act on pricing to each seller dealing with competitors in a given market is to curse the lot of the hangman of our great system while fitting the noose on the victim's neck the very day free enterprise was dying in America.

The Judgment below should be reversed, the Motions of Appellee denied and the appellee should be ordered to answer the amended complaint, and order should entered requiring appellee to answer each of the interrogatories and that each of the requested admissions be deemed as admitted for purposes of this action

Respectfully submitted,

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## APPENDIX

## Exhibits:

Affidavits:	Record
1 Donald Kvarfordt .....	55-57
2 Clifford Aldredge .....	58
3 John Rodney Blauer .....	59
4 Coy Hale .....	60
5 Royal Reid .....	61-62
6 Fred Kvarfordt .....	63-64
A through C-4, D and E .....	66
B Specifications and Bid Bond	Referring to LP File
C Affidavit Glen R. Swenson with attachments	Pages 66 through 97
D Affidavit Dee A. Broadbent	
E Affidavit Evan Stevenson attached bulletin	

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that I mailed three copies of the above Brief of Appellant by depositing three copies thereof, on the *6th* day of October, 1966, with sufficient postage on the envelope in a United States Government mail receptacle addressed to the following:

L. F. RACINE, JR  
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Center Plaza Building  
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.....  
L. CHARLES JOHNSON  
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competitors, big or small, but unfair, evil, favored and destroying price allowances literally precluding competitive survival. The plain congressional intent to assure nondiscriminatory prices to each competitor in the market place as an aid to preserve the private enterprise system should not be judicially frustrated. To do less than fully, evenly and fairly apply the federal act on pricing to each seller dealing with competitors in a given market is to curse the lot of the hangman of our great system while fitting the noose on the victim's neck the very day free enterprise was dying in America.

The Judgment below should be reversed, the Motions of Appellee denied and the appellee should be ordered to answer the amended complaint, and order should entered requiring appellee to answer each of the interrogatories and that each of the requested admissions be deemed as admitted for purposes of this action

Respectfully submitted,

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C Affidavit Glen R. Swenson with attachments	Pages 66 through 97
D Affidavit Dee A. Broadbent	
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In the  
**United States Court of Appeals**  
**For the Ninth Circuit**

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**No. 21168**

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LOGAN LANES, INC., AN IDAHO CORPORATION,  
*Plaintiff-Appellant,*  
*vs.*

BRUNSWICK CORPORATION, A DELAWARE CORPORATION,  
*Defendant-Appellee.*

---

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF IDAHO, EASTERN DIVISION.

---

**BRIEF OF APPELLEE.**

---

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
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---

**BRIEF OF APPELLEE.**

---

**STATEMENT OF FACTS.**

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This is a suit for treble damages for alleged violation of the Robinson-Patman Act (Sec. 2(a) of the Clayton Act, as amended) (15 USC §§ 13 and 15). It arises from an alleged sale of bowling lanes by defendant to Utah State University, at lower prices than plaintiff paid to defendant for similar lanes.

The Trial Court sustained defendant's motion for summary judgment ruling that (1) the Robinson-Patman Act does not apply where the purchaser obtaining the lower

price was the sovereign State of Utah, and (2) that, in any event, the purchase by Utah State University was exempt from the Robinson-Patman Act by virtue of § 13c thereof, because it was a sale to an educational institution. (R. 98-103.)

On October 5, 1959 defendant sold to plaintiff, for installation in Logan, Utah, 16 bowling lanes, pinsetters and related equipment for \$212,051.63. In the fall of 1963 additional bowling equipment was purchased by plaintiff from defendant. (R. 48.)

On March 17, 1964, defendant entered into a contract with the Utah State Building Board, a state instrumentality, for the installation of 10 bowling lanes, pinsetters and related equipment in the Student Union Building, Utah State University, at Logan, Utah. The price paid by the University for the equipment was \$81,118.56. (R. 73, 80-82.)

Commencing in June, 1964, the University incorporated the bowling lanes into its physical education program. Approximately 900 to 1,000 students annually enroll in bowling classes, receiving credit for such participation. (R. 92, 94, 96.) In addition, the bowling lanes provide extra-curricular recreation for students and faculty. (R. 92.) Limited use of the bowling lanes by the general public is permitted. (R. 94.) All income derived from the use of the bowling lanes is used to finance either student activity programs or dormitory and Union Building expansion and improvement. (R. 93.) None of the bowling equipment purchased by the University from defendant included resalable products. (R. 94, 95.)

## A. Utah State University.

Article X, Sec. 1 of the Utah Constitution provides that the legislature is to establish and maintain a system of public schools. Article X, Sec. 2 defines public schools to include “. . . an agricultural college” (formerly called Utah State University of Agriculture and Applied Science).

The government of Utah State University “. . . and the management of its property and affairs” is vested in a board of trustees made up of the Secretary of State, president of the alumni association and twelve citizens appointed by the governor with the consent of the senate (Section 53, Chapter 10-9, Utah Statutes). By virtue of 53-38-1, the board of trustees of Utah State University is authorized to set aside property for:

“... dormitories, kitchens, dining halls, auditoriums, student union buildings, field houses, stadiums, general library buildings, parking lots, parking structures, other self-liquidating projects, and other revenue producing buildings including additions to and remodeling of existing buildings used for such purposes and to construct such buildings or additions thereon and to equip, furnish, maintain and operate such buildings.”

Furthermore, 53-34-6 directs:

“... that all sums received by said institutions as a result of the operation by said institutions of bookstores, printing presses, cafeterias, dining halls, dormitories, parking lots, parking structures, or as a result of engaging in any other proprietary activities may be retained by said institutions, and said institutions may make disbursements therefrom for the payment of current bills arising in the course of said proprietary activities, . . .”

The Board of Trustees has been given specific statutory authority to construct and operate a Student Union Building under the supervision and direction of the Utah State Building Board. (53-38-1.)

## **B. Utah State Building Board.**

The Utah State Building Board was created by the Utah Legislature to “. . . carry out the building and expansion program of the State provided by law, . . .” [63-10-7]. Its five members are appointed by the Governor with the advice and consent of the Utah Senate [63-10-1].

Section 63-10-7, confers upon the Board the following powers and authority:

1. to supervise preparation of designs, plans and specifications relating to the construction or modification of State buildings;
2. To enter into contracts necessary to the performance of the duties of the Board; in this connection the Board, except in certain cases not here relevant, is required to award any contract “. . . to the lowest bidder who in the judgment of the board is responsible and qualified to do the work. The judgment of the Board as to the responsibility and qualifications of such bidders shall be conclusive, except in case of fraud or bad faith” [63-10-7(7)];
3. “To do any and all things which in its judgment may be necessary or proper for carrying out any of the purposes of this chapter, including the making of necessary and proper expenditures, with the approval of the Governor, of State money; . . .” [63-10-7(19)].

In the performance of its statutory duties, the acts of the Board are the acts of the sovereign. *Nuttall v. Berntson*, 88 U. 535, 30 P. 2d 738, 742; *Utah State Building Comm. for Use and Benefit of Mountain States Supply Co. v. Great American Indemnity Co., et al.*, 105 U. 11, 140 P. 2d 763.

## QUESTIONS PRESENTED.

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There is a considerable amount of overlapping among the 12 errors specified by the plaintiff. In addition, to analyze and distinguish all of the 113 cases cited by plaintiff would leave little space to set forth the reasons why the Trial Court correctly granted defendant's Motion for Summary Judgment. Therefore, defendant will recast the questions presented on this appeal and demonstrate the correctness of the Trial Court's opinion. Two substantive questions are presented:

1. Does § 2 (a) of the Robinson-Patman Act apply where the buyer granted the lower price is the State of Utah?

2. Does § 13c of the Robinson-Patman Act exempt the sale, in any event, because the beneficial purchaser is a university? Part of this question is whether the exemption has been lost because the university permits the general public to use its bowling lanes to a limited extent.

The Trial Court ruled for the defendant on both of these questions. If either ground for the Trial Court's ruling is correct, the other is moot. In addition, two procedural questions are presented:

1. Did defendant's Motion for Extension of Time filed on March 7, 1966 (R. 36) comply with Local Rule 7 of the District Court of Idaho, since no brief was filed in support of the motion?

2. Did the Trial Court's refusal to require defendant to answer plaintiff's interrogatories deprive plaintiff of an opportunity to demonstrate the existence of a material issue of fact?



## ARGUMENT.

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### **I. THE STATUTORY BASIS FOR THE CAUSE OF ACTION.**

Plaintiff's brief asserts that its claims arise from §§ 2(c), 2(d) and 2(e) of the Robinson-Patman Act. However, no violation of any of those sections is alleged in plaintiff's complaint or in its Specification of Errors in this Court and plaintiff's argument fails to indicate what relevancy those sections have except as they indicate that the general purpose of the Act was to forbid discrimination. For this reason, we confine our discussion to Sec. 2(a), which is the real basis of the plaintiff's claim.

### **II. THE TRIAL COURT CORRECTLY HELD THAT § 2(a) OF THE ROBINSON-PATMAN ACT DOES NOT BAR THE GRANTING OF A LOWER PRICE TO THE STATE OF UTAH.**

The defendant asserts that the Trial Court clearly was correct in its ruling and that its decision is supported by decision law, by administrative interpretation and practice and by legislative history.

Specification of Error No. 6 provides in part, "the trial court erred in holding the sales of Appellee and the transactions sued upon immune from an action under the Robinson-Patman Act." (Plaintiff's Brief, p. 14.)

The basis upon which defendant submits that § 2(a) of the Robinson-Patman Act is inapplicable to a situation in which a sovereign is granted a lower price than other customers of the seller is found in the collective action, or inaction, of all three branches of the Federal Government. Each has played a significant part in developing the law concerning the application of the Robinson-Patman Act to

governmental purchases. A review of the history of that collective action, or inaction, requires the conclusion that this Court in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (C. A. 9, 1965), *cert. den.* 383 U. S. 936, anticipated the correctness of the ruling made by the Trial Court in the instant case.

#### **A. The Sovereign Exemption Doctrine<sup>1</sup> and Its Application to Antitrust Decisions.**

One of the earliest and most widely cited opinions dealing with the sovereign exemption doctrine is *United States v. Hoar*, 26 Fed. Cas. 329 (D. Mass. 1821). The court stated (26 Fed. Cas. 330):

“Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the prin-

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1. 3 Sutherland, *Statutory Construction*, 183, 191 (3rd ed. 1943):

“General words or language of a statute that tends to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public, and, in the absence of express provision or necessary implication, the sovereign remains unaffected. (Citations omitted.)

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“Since the rule is founded on the policy of preserving government from the *injurious* consequences of a statute, the validity of the rule is destroyed where a statute offers a benefit or privilege.”

principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.”

Court decisions sustaining the doctrine span 140 years. *The Dollar Savings Bank v. United States*, 19 Wall. 227, 239; *United States v. United Mine Workers of America*, 330 U. S. 258, 272-3; *United States v. Wittek*, 337 U. S. 346, 359; *Federal Power Commission v. Tuscarora Indian Nation*, 362 U. S. 99, 120.

Plaintiff erroneously contends that the sovereign exemption doctrine excludes from the coverage of a statute only the *enacting* sovereign. No cases are cited in support of this contention. The contrary is held by at least six decisions which have held that the *federal* antitrust laws do not apply to *state* action. *Olsen v. Smith*, 195 U. S. 332; *Parker v. Brown*, 317 U. S. 341; *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F. 2d 52 (C. A. 1, 1966), cert. applied for September 12, 1966; *Lowenstein v. Evans*, 69 F. 908 (D. S. C. 1895); *General Shale Products Corp. v. Struck Construction Co.,<sup>2</sup> et al.*, 37 F. Supp. 598 (W. D. Ky. 1941), aff'd on other grounds 132 F. 2d 425 (C. A. 6, 1942), cert. den. 318 U. S. 780; *Sachs v. Brown-Forman Distillers Corp.,<sup>2</sup>* 134 F. Supp. 9 (S. D. N. Y. 1955), aff'd per curiam 234 F. 2d 959 (C. A. 2, 1956).

Examination of the facts and the Court's ruling in *Parker v. Brown* and *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, *supra*, refutes plaintiff's further contention that the sovereign exemption doctrine exempts only the sovereign and not the private party engaged in dealing with the sovereign. These cases conclusively show that *the sovereign exemption doctrine applies to the transaction to which the sovereign is a party.*

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2. Cited by this Court in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (C. A. 9, 1965), cert. den. 383 U. S. 936.

*Parker v. Brown*, 317 U. S. 341, involved, in part, the issue of whether the Sherman Antitrust Act, 15 U. S. C. § 1, barred the promulgation of restrictive marketing plans relating to production of agricultural commodities pursuant to an act of the California legislature. The purpose of the legislation was to “. . . restrict competition among the growers and maintain prices . . .” obtained by the growers in the sale of their products (317 U. S. 346). The court assumed that if the growers had initiated and effectuated an identical plan in the absence of the California Agricultural Prorate Act, a violation of the Sherman Act would have resulted (317 U. S. 350)—that is, price fixing and agreements among competitors to limit production.

Section 1 of the Sherman Act, like § 2(a) of the Robinson-Patman Act, is an all-inclusive statute on its face and contains no qualification that its provisions are not applicable to any state or to private parties engaged in transactions with a state. The statute reads (15 U. S. C. § 1):

“*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal . . .” (Emphasis supplied.)

The sovereign exemption doctrine was the basis for the Supreme Court’s decision (317 U. S. 350-351):

“But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from

their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

"The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . .

"There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations.' 21 Cong. Rec. 2562, 2457; see also 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history." (Citing cases.)

The analogy between appropriate state action involving agricultural products and education is apparent. Likewise obvious is the fact that the officers and agents of the State of Utah, in dealing with defendant, acted lawfully pursuant to the direction of the Utah legislature no less than did the officers and agents of the State of California pursuant to its legislature. Therefore, just as the participation of the State of California in the Prorate Program insulated the private growers from liability for fixing prices and allocating production—so the defendant here is insulated from liability under § 2(a) of the Robinson-Patman Act where the State of Utah participated in the very transaction under attack.

*Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F. 2d 52 (C. A. 1, 1966), cert. applied for September 12, 1966, involved a suit for treble damages and injunctive relief against a governmental agency and two private parties. The Port Authority took over control of the Boston Airport and entered into an exclusive contract with one of the defendants whereby the latter would operate the airport through a subsidiary, also named as a defendant. The complaint alleged that the exclusive contract represented



a conspiracy, combination or contract in restraint of trade, thereby violating Section 1 of the Sherman Act. The Trial Court dismissed the suit on the grounds that the complaint failed to state a cause of action.

The Court of Appeals affirmed after finding that the Port Authority is "... a public instrumentality ..." and that it performs "... an essential governmental function." (362 F. 2d 52.) That finding was the basis for application of the sovereign exemption doctrine enunciated in *Parker v. Brown* (362 F. 2d 55-56):

"... What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action. As stated by the Supreme Court in *Parker v. Brown*, 317 U. S. 341, 350-351, 63 S. Ct. 307, 313, 87 L. ed. 315 (1943):

'We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .'

The private parties named in the lawsuit as defendants raised the defense that "... the only conduct alleged against them is in connection with the Authority's exercise of a governmental function which is not subject to the anti-trust laws." (362 F. 2d 55, fn. 10.) The Court of Appeals concluded that it was not necessary for it to pass on this defense. The court stated (362 F. 2d 56):

"... it should be noted that the only conduct of the defendants, Butler or Butler-Boston, alleged to have been in violation of the antitrust laws had to do with their dealings with the Authority in the exercise of a governmental function. *If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the*

*other defendants acted illegally in having aided it.*"  
(Emphasis supplied.)

The relevancy of *Wiggins* to this case is clear and convincing. The sovereign exemption doctrine insulates from antitrust liability any state and private parties dealing with it when the state is engaged in carrying out its statutory powers.

Moreover, *Wiggins* contradicts plaintiff's argument that the rationale of *Parker v. Brown* has been dissipated by time. *Wiggins* was decided on June 15, 1966.

Plaintiff urges that the power of Congress over interstate commerce under the Sherman Act, at the time of the decision in *Parker v. Brown*, was "more restricted than presently viewed," by the Supreme Court. (Plaintiff's Brief, p. 46.) *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127, a 1962 decision, is directly contrary to plaintiff's argument. In connection with the power of Congress over interstate commerce under the Sherman Act, the Court unanimously stated, citing *Parker v. Brown* (365 U. S. 135-36):

"It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co. v. United States*, that the Sherman Act forbids only those trade restraints and monopolizations that are created, or attempted, by the acts of 'individuals or combinations of individuals or corporations.' Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out."

See also fn. 17 citing with approval *Parker v. Brown* (365 U. S. 137).

In summary, *Parker v. Brown* and *Wiggins Airways, Inc. v. Massachusetts Port Authority*, *supra*, hold that: (1) the sovereign exemption doctrine applies to the anti-

trust laws of the United States notwithstanding that the sovereign is a state; (2) the sovereign exemption doctrine applies to the transaction to which a sovereign is a party; (3) the sovereign exemption doctrine is to be applied so as to not allow antitrust suits to obstruct or hinder a sovereign in carrying out its lawful activities.

No seller would offer a sovereign a government discount were the Robinson-Patman Act to be inapplicable only to the buyer. The threat of treble damage actions would, for most sellers, eliminate government discounts from seller's price lists. Depriving a sovereign of the right to obtain goods at the lowest possible price "would be an unreasonable restriction on its freedom . . ." (362 F. 2d 56).

Although not squarely deciding the point which is now before this Court, in *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F. 2d 851 (C. A. 9, 1965), *cert. den.* 383 U. S. 936, this Court had occasion to comment on the general question of whether the Robinson-Patman Act applies to sales to the State of Idaho. This Court stated (at 858-9):

"Defendants also argue, with regard to the general applicability of Section 2(c), that sales to a sovereign are excluded, and hence payments made to Grimes in connection with Rangen's sales to the State of Idaho are not covered by that subsection. Several district courts have apparently so ruled, on the theory that such an exemption is required by the policy which allows the sovereign to buy at the best price obtainable. (Citing cases.)

"Assuming that there is such a policy and that it gives rise to such an exemption in an appropriate case, it has no room to operate here. Idaho was the victim, not the beneficiary, of the transactions here in question. It paid more than should have, instead of less. Under the circumstances of this case, enforcement of section 2(c) will serve, rather than defeat, the as-

serted policy, by discouraging bribery of state officials.”

We have shown above that the policy which this Court, in the *Rangen* case, noted as the holding of “several district courts,” stems in fact from a principle of law long adhered to by the Supreme Court and other reviewing courts.

The circumstances which made the doctrine inoperable in the *Rangen* case are not, of course, present in this case.

## **B. Administrative Interpretation.**

In April, 1936 the Attorney General of the United States rendered an opinion that bears heavily on the application of the sovereign exemption doctrine to the Robinson-Patman Act. The Secretary of War requested an opinion from the Attorney General as to whether motor contract carriers, subject to regulation by the Interstate Commerce Commission, could legally quote rates to the Government that were lower than the rates on file with the I. C. C. The section under consideration, § 218 of the Motor Carrier Act, contained an outright prohibition against charging or collecting a rate less than the applicable rate on file with the I. C. C. Thus, the Attorney General was confronted with a statute that on its face appeared to be all encompassing and without exception and, therefore, a limitation on the Government obtaining lower rates.

In holding that § 218 did not bar the granting of rates to the Government lower than the rates on file with the I. C. C. the Attorney General first invoked the sovereign exemption doctrine,<sup>3</sup> (38 Op. 452, 453):

“If section 218 of the Motor Carrier Act is binding on the Government, it deprives the Government of a

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3. For the convenience of the Court, the opinion is attached to this brief as Appendix A.

right, namely: *the right to contract with contract carriers by motor vehicle for transportation at the lowest possible rate.*" (Emphasis supplied.)

Moreover, the Attorney General ruled that the purpose of the Motor Carrier Act was to regulate motor carriers so as to protect commerce and to prevent "discriminations" which would result in improper advantages and "destructive competitive practices." (38 Op. 455.) These purposes could be carried out and still permit the charging of lower preferential rates to the Government, according to the Attorney General.

This opinion by the Attorney General invoked the sovereign exemption doctrine based upon the fact that the government was entitled to the lowest price it could obtain from a carrier. It was his view that the purpose of the Motor Carrier Act was not in conflict with the right of the sovereign to obtain transportation as economically as possible.

The Attorney General's opinion as to controlling public policy was rendered in the light of his certain realization of the provisions of the Clayton Act as then in force.

In 1914 Congress enacted the Clayton Act, 15 U. S. C. § 13. Section 2 of that Act provided:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, . . . ."



It must be assumed, therefore, that the Attorney General did not believe that by § 2 of the Clayton Act, Congress had legislated a different policy as to sovereign exemption than it applied to the Motor Carrier Act.

Two months after the Attorney General rendered the opinion to the Secretary of War concerning the Motor Carrier Act, Congress passed the Robinson-Patman Act as an amendment to the Clayton Act. § 2(a) amended § 2 of the Clayton Act and provided, in part (15 USC § 13(a)):

“That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them:  
 . . . .”

Six months after the passage of the Robinson-Patman Act, the Attorney General of the United States was requested to render an opinion “. . . concerning the application of the Robinson-Patman Act . . . to government contracts for supplies.”<sup>4</sup> In holding that the Act did not apply to purchases by the Government, the Attorney General relied on three basic propositions (38 Ops. 539):

1. His opinion of April 20, 1936, Appendix A, had demonstrated that statutes regulating rates, etc.,

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4. For the convenience of the Court, the opinion is attached to this brief as Appendix B.

do not "... ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of Congress to make such statutes applicable to the Government."

2. The Robinson-Patman Act, in amending the Clayton Act, did not add language to the statute which had any bearing on the question propounded by the Secretary of War. During the twenty-two years between the enactment of the Clayton Act price discrimination proviso and the passage of the Robinson-Patman Act, the Attorney General was unable to find any authority for the proposition that § 2 of the Clayton Act applied to sales to the government.
3. While the Clayton Act was in effect it was a known custom of the trade "... for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for supplies. Such prices are often below the regular market for similar material supplied to the regular trade. . . ."

In conclusion, the Attorney General stated that he felt obligated to render an opinion thereby (38 Op. 540):

"... avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance."

The views expressed by the Attorney General were consistent with the purpose for which the Robinson-Patman Act was enacted. In 1936 Congress was not concerned with sovereigns obtaining preferential pricing. During that time the state of the economy which resulted in expanded government activity, both at the state and federal level, belies any contention that Congress viewed with alarm the

commercial custom of granting lower prices to government. Rather, the Robinson-Patman Act was intended to combat the growing influence of the chain store organization which used its buying power to extract from suppliers price concessions that permitted the chain stores to underprice independent competitors. *Federal Trade Commission v. Henry Broch & Co.*, 363 U. S. 166, 168; *Federal Trade Commission v. Sun Oil Co.*, 371 U. S. 505, 516.

The contemporaneous opinion of the Attorney General that the sovereign exemption doctrine applied to the Robinson-Patman Act is entitled to great weight since the Attorney General shares concurrent jurisdiction to enforce the Act. *Power Reactor Development Co. v. International Union of Electrical, Radio & Machine Workers, AFL-CIO, et al.*, 367 U. S. 396, 408; *Zemel v. Rusk, Secretary of State, et al.*, 381 U. S. 1, 11.

### C. Legislative History.

Congressional debates on the Robinson-Patman Act give no clue as to whether the Act was intended to apply to the federal and state governments so as to nullify the sovereign exemption doctrine. However, during hearings on the bill, a colloquy did take place between members of the Committee and the chief lobbyist for the bill, Mr. Teegarden.<sup>5</sup>

The colloquy, *Hearings before the House Committee of the Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess. 208-9, 1935*, conclusively demonstrates that Congressmen Lloyd, Hancock and Michener were aware that the government obtained goods at prices lower than other buyers and that they were concerned that the proposed bill might be construed to apply to government purchases. The concern they expressed was not limited to the United

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5. For the convenience of the Court, the colloquy is attached to this brief as Appendix C.

States but included states, cities and municipalities as well.

The colloquy also shows that the Congressmen did not place any significance on what the purchasing sovereign might subsequently do with the goods. Their concern related solely to the possible effect of the Act on the purchase itself.

Following his testimony, Mr. Teegarden submitted a brief to the House Judiciary Committee. The brief demonstrates that in view of the concern voiced by the Congressmen that the Act might be construed to apply to purchases by federal, state and local governments, Mr. Teegarden deemed it advisable to silence the concern by referring to the sovereign exemption doctrine (Hearings, 74th Cong. 1st Sess. *supra* at 250):

“2. Would the bill prevent competitive bidding on Government purchases *below trade price levels*?

“This question was raised by a member of the committee at the hearing. The answer is found in the principle of statutory construction that a statute will not be construed to limit or restrict in any way the rights, prerogatives, or privileges of the sovereign unless it so expressly provides—a principle inherited by American jurisprudence from the common law (citing cases).

“The further insertion of the clause proposed under topic 4 below, requiring: a showing effect upon competition, will further preclude any possibility of the bill affecting the Government.” (Emphasis supplied.)

The silence of Congress—its failure to embody any provisions in § 2 of the Robinson-Patman Act which would make inapplicable to it the long-established doctrine of sovereign exemption, after that doctrine had been specifically brought to its attention, is a very significant fact of legislative history.

In *United States v. United Mine Workers of America*, 330

U. S. 258, the question was whether the United States was entitled to an injunction against defendant union in view of the fact that § 13 of the Norris-LaGuardia Act, on its face, appeared to prohibit such relief. The sovereign exemption doctrine and inaction by Congress were held to be the means by which the court would construe § 13 (330 U. S. 272-3):

“... There is an old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. It has been stated, in cases in which there were extraneous and affirmative reasons for believing that the sovereign should also be deemed subject to a restrictive statute, that this rule was a rule of construction only. Though that may be true, the rule has been invoked successfully in cases so closely similar to the present one, and the statement of the rule in those cases has been so explicit, that we are inclined to give it much weight here. *Congress was not ignorant of the rule which those cases reiterated; and, with knowledge of that rule, Congress would not, in writing the Norris-LaGuardia Act, omit to use ‘clear and specific [language] to that effect’ if it actually intended to reach the Government in all cases.*” (Emphasis supplied and footnotes omitted.)

Nor can the continued non-action of Congress on this point after 1936 be attributed to mere oversight or inattention. Twice thereafter Congress was asked to amend the Robinson-Patman Act so that *it would forbid granting discriminatory prices to the United States government or any state or political subdivision.*

In 1951 and again in 1953, Congressman Patman, one of the co-sponsors of the 1936 legislation, introduced such bills, as H. R. 4452 (82nd Cong., 1st Sess.) and H. R. 3377 (83rd Cong., 1st Sess.). Both bills were referred to the Judiciary Committee and died there.

We submit that the non-passage of H. R. 4452 and H. R. 3377, following the implicit incorporation by Congress of



the doctrine of sovereign exemption when the Robinson-Patman Act was enacted, conclusively establishes, under the rule in the *United Mine Workers* case that sovereign exemption is in fact incorporated in § 2(a).

**III. THE TRIAL COURT CORRECTLY HELD THAT THE PURCHASE BY UTAH STATE UNIVERSITY FROM DEFENDANT WAS WITHIN THE NON-PROFIT INSTITUTION EXEMPTION OF 15 U. S. C. § 13c.**

The Trial Court ruled, as an alternative ground for granting defendant's Motion for Summary Judgment, that Utah State University was a "... university ..." within the meaning of 15 U. S. C. § 13c, thereby exempting the purchase of bowling lanes, pinsetters and related equipment made by the University from defendant. (R. 102.)

The statute provides:

"Nothing in sections 13-13b and 21a of this title, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit."

Since we have shown (*supra*, pp. 3, 4) that the University was empowered to construct and operate a student union, and since, under the statutes of Utah, the mechanics of such a project were that the Utah State Building Board was to contract for the building for the University, it would be a strained and artificial construction of Sec. 13c to contend that within its intent and purpose the sale in this case was not a sale to the University.

The Utah State Building Board did not sell or convey the student union building to the University—it simply turned it over to the University after completion and acceptance by it. (R. 79.) In effect, the Board was simply the purchasing and building agency for the University. Both of them were, therefore, the State of Utah.

*Student Book Company v. Washington Law Book Company*, 232 F. 2d 49 (C. A. D. C. 1955), *cert. den.*, 350 U. S. 988, is the only court decision that has passed on the meaning of § 13c.

That case involved an alleged price discrimination by defendant in selling law books to the plaintiff at a higher price than defendant charged certain university book stores who competed with plaintiff. Defendant asserted § 13c as a defense to the action. The Court rejected the application of § 13c on the basis of the fact that the books were sold to the competing book stores for subsequent sale at a profit. The Court stated (232 F. 2d 50-51, fn. 5):

“Appellee also argues that, even if its transactions with the campus book stores were sales, they were exempted from the application of the Robinson-Patman Act by virtue of 52 Stat. 446, 15 U. S. C. § 13c, which provides:

‘Nothing in sections 13-13b \* \* \* of this title shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.’

“Although the appellee has sold books to all three of the universities *for their own use, i. e., for their libraries*, the transactions here in question were not actually with the universities, but with the self-sustaining campus book stores, and *the books sold were not for the use of the universities, but for resale at a profit*. The exemption provision is therefore inapplicable to these transactions.” (Emphasis supplied.)

The rationale of the Court's opinion is clear. When a university, or other named type of non-profit institution, purchases commodities for the purpose of resale, with the intent of becoming a competitor in the public market, it cannot be said to have purchased for its own use.

In this case, however, it is uncontroverted that the bowling alleys in the student union were *used* as part of the University's physical education program and were also *used* as recreational facilities for the students and faculty. They also were *used*, by the University, to a minor extent, for public bowling; that is, less than 2.3%. (R. 94.) They never were sold or otherwise placed in the control of anyone else.

A state university is not a cloister in which students and faculty are sealed off from the life of the community. It would gravely inhibit the usefulness and public service of such an institution to hold that it forfeited the exemption extended by Congress if it *used* its property, even to a limited extent, for the benefit of the taxpayers who supported it.

Defendant submits that the affidavits of Dee A. Broadbent (R. 92-93) and Evan Stevenson (R. 94-95) conclusively show that the bowling lanes were not operated in a manner so as to personally benefit any person. To the contrary, once revenues were used to pay expenses, any excess moneys were used for student activity programs or University building projects.

Plaintiff argues that Sec. 13c does not apply here because the student union received income and, perhaps, realized a profit, on its public bowling. This, it is claimed, takes it out of the category of institutions "not-for-profit".

This argument flies in the face of common understanding of what a corporation "not-for-profit" is. Such an institution is one which distributes no earnings to its stockholders or others. The fact that some phase of its operations may be profitable, the profit being used to support the institution as a whole, does not make it any less an institution "not-for-profit".

The Trial Court correctly interpreted the language in

§ 13c as it applied to the purchase by Utah State University of bowling equipment from defendant. The ruling of the Trial Court should be sustained.

#### **IV. THE TRIAL COURT WAS CORRECT IN FINDING THAT DEFENDANT HAD COMPLIED WITH LOCAL RULE 7.**

The Complaint was filed on January 21, 1966. (R. 4.) On February 8, 1966 plaintiff served defendant with 65 Interrogatories and 37 Requests for Admissions. (R. 15, 21.) Defendant obtained from plaintiff, on February 14, 1966, an extension of time until March 7, as to all of these matters. (R. 32.) On March 7 defendant filed a Motion to Dismiss on the ground that the Complaint failed to state a cause of action. (R. 34.) On the same day, defendant filed a Motion to Extend the Time within which the Interrogatories and Request for Admissions were to be answered to a date 10 days after the Court had ruled on the Motion to Dismiss. (R. 36.)

The Motion for Extension of Time stated the following grounds for the motion (R. 36):

“This request for extension of time is made on the grounds and for the reasons that Plaintiff has submitted 64 Interrogatories to Defendant and 37 Requests for Admissions; that such Interrogatories and Requests for Admission require extensive research and time in obtaining the information with which to respond to such Interrogatories and Requests. That in the event the Motion to Dismiss of the Defendant should be ruled upon favorably to the Defendant by the Court, and Defendant believes and asserts that such Motion is meritorious, a requirement that the Defendant respond to the Interrogatories and Requests for Admissions prior to such a ruling by the Court would be unduly burdensome, expensive, and, in fact, a useless act.”

On the same day that the Motion to Dismiss and the Motion to Extend Time for Answering the Interrogatories and Requests for Admission were filed, amended Local Rule 7 of the District Court of Idaho became effective. That rule provides, in effect, that any motion is to be accompanied by documentary support of the motion and a brief containing the reasons for the motion, along with “. . . points and authorities relied upon by the moving party.” (R. 35.)

Plaintiff failed to oppose defendant’s Motion to Extend Time within 5 days, as provided for in the Rule. (R. 35.) Rather, plaintiff waited 17 days, until March 24, when it filed a Motion to Compel Defendant to Answer the Interrogatories and to strike Defendant’s Motion to Extend Time. (R. 39.) The Trial Court ruled on May 20 that defendant’s Motion to Extend Time should be granted and that plaintiff’s Motion of March 24 should be denied. (R. 65.)

Plaintiff’s contention that a motion for extension of time to answer interrogatories and request for admissions is waived unless a separate brief is filed in support of the motion (Plaintiff’s Brief, p. 5) is hypertechnical and absurd. No citation of “. . . points and authorities . . .” is necessary or appropriate to support such a motion to extend time, because the discretionary power of the court to grant such a motion, for cause shown, is universally recognized, and is specifically provided for by Rules 33 and 36 of the Federal Rules of Civil Procedure, which provide that on “. . . motion and notice . . .” the time to answer interrogatories and request for admissions may be extended. In addition, Rule 6(b) of the Rules provides that an extension of time may be granted “. . . with or without motion or notice . . .”

Furthermore, section (c) of Local Rule 7 specifically states that “. . .[g]enerally, motions shall be submitted and



determined upon the motion papers referred to, . . .” (emphasis supplied.) The rule does not say “in all cases”, so as to require a brief to be filed when it would be a useless act.

The Trial Court found that defendant’s motion for extension of time complied with Local Rule 7. “A court is, of course, the best judge of its own rules.” *United States Fidelity and Guaranty Company v. Lawrenson*, 334 F. 2d 464, 467 (C. A. 4, 1964), *cert. den.* 379 U. S. 869. See to the same effect *Cunningham v. Schmidt, et al.*, 267 F. 2d 690 (C. A. D. C. 1959.)

**V. THE TRIAL COURT WAS CORRECT IN TREATING DEFENDANT’S MOTION AS A MOTION FOR SUMMARY JUDGMENT SINCE THERE WAS NO GENUINE QUESTION OF MATERIAL FACT.**

Plaintiff’s Specifications of Errors 1, 2, 3, 4, 5, 6, 7, 9 and 12 challenge the propriety of the Trial Court’s treatment of defendant’s Motion to Dismiss as a Motion for Summary Judgment, under Rule 12(b) of the Federal Rules of Civil Procedure.

Plaintiff struggles, but in vain, to show that the decision on defendant’s motion involved disputed questions of fact as to which (a) the controlling facts were not before the Trial Court and (b) the facts would have been brought out if defendant had been compelled to respond to plaintiff’s Interrogatories and Notice to Admit Facts.

Inasmuch as the plaintiff has never disputed the fact that the sale in question was made to the Utah State Building Board, an instrumentality of the State of Utah, the first substantive question raised by defendant’s motion—the sovereign exemption from § 2(a)—was a pure question of law.

As to the second substantive issue—whether the sale

was to an educational institution "for its own use"—the plaintiff's arguments are equally unavailing. The plaintiff states that the facts which it wished to bring before the Trial Court were "... the facts on competing facilities and other background facts. . . ." (Plaintiff's Brief, p. 6), the facts relating to "... the public use of the facilities." (Plaintiff's Brief, p. 13) and "... the full extent of public use of student union building facilities." (Plaintiff's Brief, p. 50.) The fact that the bowling lanes in the Student Union Building were made available to a limited extent for public use is clearly shown by the record. Any other "background facts" as to the use to which such facilities were put could not be determined from the defendant, in any event. The defendant merely sold the bowling lanes to the Utah State Building Board for installation in the Student Union Building. It did not thereafter operate them or have anything further to do with them.

Consequently, the case would be in no different posture whatever if the Trial Court had compelled the defendant to go through the useless procedure of responding to the plaintiff's discovery motions.

Nor is there any merit in plaintiff's contention that it was unable to show the amount or degree of public use of the bowling facilities at Utah State University. The Manager of the University Union Building, where the bowling lanes were located, stated in paragraph 5 of his affidavit, dated April 8, 1966, that of 129,349 lines bowled between July, 1964 and March 31, 1966, 2,934 lines were bowled by persons other than students, faculty, staff and guests of the University. (R. 94.) The six affidavits submitted by plaintiff (R. 55-64) confirmed the public use conceded by the Union Building Manager, thereby eliminating any fact issue as to whether the public used the bowling lanes.

With no issue of fact as to public use, the legal issue was

ripe as to the alternative contentions of the parties as to the meaning of § 13c: whether the words “. . . for their own use . . .” meant “for their own use” and not for resale, as contended by defendant, or whether the words meant “for their own use” and not for use by persons other than students, as contended by plaintiff. (Transcript of Oral Argument, pp. 24-25, 36.) This raised a purely legal issue.

There is still another compelling reason why the Trial Court was justified in passing upon the Motion for Summary Judgment without first permitting a factual inquiry into the degree of public use of the University bowling lanes. Neither the Interrogatories nor the Request for Admissions served upon defendant sought out information on the extent of public use of the bowling lanes and for good reason. Defendant's connection with the bowling lanes was limited to performing its contract to supply and install the lanes and related equipment. Therefore, even if the Trial Court had required defendant to answer the Interrogatories and had ruled that defendant admitted all the Requests for Admissions under a waiver theory, plaintiff would thereafter possess no more information concerning the extent of public use than it had on the date it filed its discovery motions.

The affidavits of Dee A. Broadbent (R. 92, 93) and Evan Stevenson (R. 94, 95) both dated April 8, 1966, filed with defendant's reply brief in connection with the Motion for Summary Judgment, put plaintiff on notice that information concerning the degree of public use of the bowling lanes was available in the records of the University.

Notwithstanding this notice, plaintiff elected not to move by affidavit under Rule 56(f) of the Federal Rules of Civil

Procedure dealing with opposition to a motion for summary judgment. That Rule provides:

“Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”

By filing an affidavit stating that essential facts concerning the degree of use of the bowling alleys were not presently known, but were available at the University, plaintiff might have persuaded the Trial Court to postpone ruling on the Motion for Summary Judgment. Having failed to take advantage of Rule 56(f), plaintiff is not now in a position to insist that the Trial Court failed to give plaintiff the opportunity to discover additional facts. The opportunity to discover further was never requested by plaintiff in the manner provided for in Rule 56(f).

Plaintiff elected to stand on the affidavits it filed in opposition to defendant's motion. Only one of such affidavits even attempted to raise an issue of fact as to the degree of public use of the University bowling lanes. It was the affidavit of Donald D. Kvarfordt, Manager of plaintiff. In his affidavit Mr. Kvarfordt stated (R. 57):

“Watching the operation at the Union Building it appears most probable that records do not accurately separate or show student lineage from other bowling lineage.”

That such a conclusory statement is entitled to no weight is clear from a reading of Rule 56(e) of the Federal Rules of Civil Procedure. The Rule provides:

“Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as

would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.”

Affiant Donald Kvarfordt has no “personal knowledge” of the degree of public use of the University bowling lanes. His conclusory statement about the accuracy of the University records would not be admissible in evidence and his mere use of the University bowling lanes would not make him a competent witness on the question of the extent of public use. Therefore, his affidavit clearly fails to meet the standards required by Rule 56(e).

Furthermore, Rule 56(e) provides an alternative means for plaintiff to put in issue the question of public use of the University bowling lanes. Mr. Kvarfordt's affidavit could have been supplemented at plaintiff's option, by depositions, answers to interrogatories or additional affidavits. Plaintiff's failure to invoke Rule 56(e) supplies an additional reason why Specification of Errors 1 through 7, 9 and 12 have no merit.

For all of the reasons set forth above, there is no merit whatever in plaintiff's arguments that it was deprived of any opportunity to present additional facts which could



have been relevant or controlling on the issues raised by  
defendant's Motion for Summary Judgment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that I mailed three copies of the above Brief of Defendant-Appellee by depositing three copies thereof, on the ..... day of November, 1966, with sufficient postage on the envelope in a United States Government mail receptacle addressed to the following:

JOHNSON AND OLSON,  
L. CHARLES JOHNSON,  
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Box 1725,  
Residence: Pocatello, Idaho.

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NED ROBERTSON,  
*Attorney.*

## APPENDIX A.

## DEPARTMENT OF JUSTICE,

*April 20, 1936.*

SIR: Reference is made to your letter of April 4, 1936, in which you request my opinion as to whether "under the provisions of section 218 of the so-called Motor Carrier Act, 1935 (49 Stat. 543, 561; U. S. C., Title 49, Secs. 301-327), contract carriers by motor vehicles may quote lower rates to the Government than those prescribed in tariffs required to be filed with the Interstate Commerce Commission."

The Motor Carrier Act was enacted as an amendment to the Interstate Commerce Act (c. 1, U. S. C., Title 49), being designated as Title II thereof. The Act relates to and defines both common carriers by motor vehicle and contract carriers by motor vehicle. Section 218, which relates only to contract carriers by motor vehicle, requires that such a carrier shall file with the Interstate Commerce Commission schedules of its minimum charges for the transportation of passengers or property in interstate commerce, and provides that it shall not demand, charge, collect, accept, or receive for such transportation a less compensation than that contained in the schedules filed by it until such schedules have been modified or changed in the manner prescribed in the section.

It is a well-established rule of common law that the sovereign authority is not bound by a statute which tends to restrain or diminish its powers, right, or interest unless it is named therein. *United States v. Herron*, 20 Wall. 251; *Guarantee Co. v. Title Guaranty Co.*, 224 U. S. 152. Judge Story in *United States v. Hoar*, 2 Mason 314, stated the rule in the following language:

“Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different, and often contrary force to the government itself. It appears to me, therefore, to be a safe rule founded in the principles of the common law, that the general words of a statute ought not to include the government, or affect its rights, unless that construction be clear and indisputable upon the text of the act.”

If section 218 of the Motor Carrier Act is binding on the Government, it deprives the Government of a right, namely: the right to contract with contract carriers by motor vehicle for transportation at the lowest possible rate. Therefore, under the rule above stated the provisions of the section are not applicable to contracts with the Government unless made so, either expressly or impliedly, by the provisions of the Act.

I find no language in either the section itself or any other parts of the Act which makes the section applicable by express terms; nor is there, in my opinion, anything in the section which by necessary implication makes it applicable. It will be noted, however, that section 217 of the Act, which relates to common carriers by motor vehicle and provides that such a carrier shall not charge for transportation in interstate or foreign commerce a higher or a lower rate than that contained in its schedules on file with and approved by the Interstate Commerce Commission, contains the following proviso:

“*Provided*, That the provisions of sections 1 (7) and 22

(1) of this title shall apply to common carriers by motor vehicles subject to this chapter.”

The reference to Title I is to the Interstate Commerce Act as it existed prior to the enactment of the Motor Carrier Act as an amendment thereto, and section 22 (1) of that Act, which relates to the provisions governing rates which may be charged by carriers by rail and water, provides in part:

“Nothing in this chapter shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, \* \* \*.”

The express exemption of Government contracts from the provisions of section 217, and also from the general provisions of the Interstate Commerce Act, and the absence of express exemption of such contracts from the provisions of section 218 raises the question whether under the maxim *expressio unius exclusio alterius* the provisions of section 218 are by necessary implication made applicable to such contracts.

The maxim *expressio unius exclusio alterius* “expresses a rule of construction, not of substantive law, and serves only as an aid in discovering the legislative intent \* \* \*.” *United States v. Barnes*, 222 U. S. 513, 519. “Great caution is requisite in dealing with it \* \* \*. It is often a valuable servant, but a dangerous master \* \* \* and \* \* \* ought not to be applied, when its application \* \* \* leads to inconsistency or injustice.” *Ford v. United States*, 273 U. S. 593, 612. “It is not of universal application, and when to apply it would be to defeat the accomplishment of the manifest purpose of the act, and to prevent the attainment of the end for which the act was passed, we certainly must decline to be governed by it.” *City of New York v. Davis*, 7 F. (2d) 566, 575. It is never applied when that which is expressed is merely declaratory of existing law; but only when it is creative of new law, or in derogation of



existing law. *Straus v. Yeager*, 48 Ind. App. 448; 93 N. E. 877, 881; *Yardley & Co., Ltd. v. United States*, 22 C. C. P. A. 390; *Barbat v. Allen*, 7 Exch. 608; Sutherland on Statutory Construction, 2d Ed., section 491; Maxwell on Interpretation of Statutes, pp. 547, 548. It is never invoked when to do so would contradict the public policy of the sovereign. *Forsythe v. Paschal*, 34 Ariz. 380; 271 Pac. 865.

The exemption of contracts with the Government from the provisions of section 217 and Title I of the Act does not create any new law. Such contracts would be exempt without any express statement in the Act to that effect. The exemption is therefore merely declaratory of the law as it already existed, and is not creative. Moreover, to apply the rule in this case, thereby making the provision of section 218 applicable to contracts with the Government, would not only be in derogation of the rights of the Government, but would also be contrary to the public policy of the United States as expressed by the Congress in various statutes requiring that all Government contracts, except in cases of emergency, be let to the lowest responsible bidder after proper advertising. This policy of the Government with respect to contracts is not to be lightly passed over, and certainly it should not be cast aside unless the Congress by clear expression so directs.

The purpose of the Motor Vehicle Act, expressly stated therein, is to regulate transportation by motor carriers in such manner as to foster, promote, and protect interstate and foreign commerce by motor carriers, and to prevent in connection therewith unreasonable charges and unjust discriminations resulting in undue preferences or advantages and unfair or destructive competitive practices. It is not necessary for such purposes that section 218 be binding upon the Government. The unreasonable charges, unjust discriminations, undue preferences, and unfair destructive competitive practices sought to be prevented relate entirely

to private shippers. As was said by the Supreme Court in *Nashville Ry. v. Tennessee*, 262 U. S. 318, 323, in discussing the analogous requirements contained in the Interstate Commerce Act, "the grant of a lower rate \* \* \* to a government \* \* \* may benefit the government without subjecting to prejudice any person, locality or class of traffic." Again, in *Emergency Fleet Corp. v. Western Union*, 275 U. S. 415, 425, the Court, discussing the same principle as related to telegraph rates, said:

"It may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government provisional rates."

Moreover, to hold that section 218 is applicable to Government contracts would give rise to an inconsistency. One of the expressed purposes of the act is to prevent unjust discrimination. It would indeed be an anomaly to hold that the Congress intended to make the general purposes of the Act, including the purpose to prevent *unjust discrimination*, relate to contracts with the Government as well as to contracts with private shippers, and also to hold that it intended by section 218 of the act to deny to contract carriers by motor vehicle the same freedom in making contracts with the Government that common carriers by motor vehicle are, under the proviso in section 217, expressly permitted to enjoy. Such a paradox should not be assumed from the mere fact that the Congress in section 217 and Title I of the Act inserted a provision which was merely declaratory of existing law.

It is my opinion, therefore, that the provisions of section 218 do not apply to contracts with the Government, and that contract carriers by motor vehicle may quote to the Government lower rates than those contained in their schedules on file with the Interstate Commerce Commission.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.

## APPENDIX B.

DEPARTMENT OF JUSTICE,

December 28, 1936.

SIR: I have your letter of October 30, requesting my opinion concerning the application of the Robinson-Patman Act (approved June 19, 1936, c. 592, 49 Stat. 1526) to government contracts for supplies.

The statute reads, in part, as follows:

“Section 2 of the Act entitled ‘An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,’ approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

“SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities *of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce*, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them*: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery re-

sulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: \* \* \*." [Italics supplied.]

Aside from the proviso, the above quoted portion of the statute differs from Section 2 of the Act of October 15, 1914, in no respect save as indicated by the underscored words, which did not appear in the earlier statute. The language of the proviso is different from that of the corresponding proviso in the earlier statute, but the change does not bear upon the question which you have submitted.

In my opinion of April 20, 1936 [38 Op. 452], to the Secretary of War concerning contracts with motor vehicle carriers, it was pointed out that statutes regulating rates, charges, etc., in matters affecting commerce do not ordinarily apply to the Government unless it is expressly so provided; and it does not seem to have been the policy of the Congress to make such statutes applicable to the Government. As Mr. Justice Brandeis observed in *Emergency Fleet Corporation v. Western Union Telegraph Company*, 275 U. S. 415, 425, "it may be doubted whether the prescribed rule requiring equality of treatment would ever be violated by giving to the Government preferential rates."

The Act of June 19, 1936, merely amended the Act of October 15, 1914, as above pointed out, and, in so far as I am aware, the latter Act has not been regarded heretofore as applicable to Government contracts. The practice in this respect indicates that it has been customary in the past for those dealing with the various agencies of the Federal Government to grant to them special prices on contracts for supplies. Such prices are often below the regular market for similar material supplied to the regular trade—due, perhaps, to an estimated lower cost of doing business with the Government because of quantity purchases and absence of credit risk, solicitation expense, etc., although it may often be impossible to evaluate such factors with exactness.

It has been suggested that the force which would ordinarily be attributed to this practice may be weakened because of the probability that the prices named have seldom, if ever, violated the statute, even assuming its application. Perhaps this is true. It is also conceivable that if the past practice is maintained the prices hereafter named to the Government will seldom, if ever, violate the amended statute, likewise assuming its application; and this would seem to supply another reason for avoiding a construction that would make the statute applicable to the Government in violation of the apparent policy of the Congress in such matters, in the absence of any clear indication that it intended to depart from that policy in this instance.

It is therefore my opinion that the Act of October 15, 1914, as amended by the Act of June 19, 1936, is not applicable to Government contracts for supplies.

Respectfully,

HOMER CUMMINGS.

To the SECRETARY OF WAR.



**APPENDIX C.**

MR. LLOYD. Would this bill, in your judgment, prevent the granting of discounts to the United States Government?

MR. TEEGARDEN. Not unless the present Clayton Act does so. So far as that problem is concerned, it is no different from that which exists under the present Clayton Act.

MR. LLOYD. For instance, the Government gets huge discounts. Take that electric fan, for instance. You go to the ordinary store and the list price is \$35. The Procurement Division procures them delivered, one at a time, for \$13.18. Now, would that discount be barred by this bill?

MR. TEEGARDEN. I do not see why it should, unless a discount contrary to the present bill would be barred—that is, the present law—would be barred by that bill.

Aside from that, my answer would be this: The Federal Government is not in competition with other buyers from these concerns. Therefore a discrimination—it is so applied universally in interstate commerce law, in the railroad law—to have a discrimination, there must be a relative position between the parties to the discrimination which constitutes an injury to one as against the other. I think the answer is to be found in that.

In other words, if seller A makes a price to a retailer in New York and a different price to a retailer in San Francisco, all other things aside, no case of discrimination could be predicated there, because the two are not in the same sphere at all.

The Federal Government is saved by the same distinction, not of location but of function. They are not in competition with anyone else who would buy.

MR. HANCOCK. It would eliminate competitive bidding

all along the line, would it not, in classes of goods that would be covered by this bill?

MR. TEEGARDEN. You mean competitive bidding on Government orders?

MR. HANCOCK. Government, State, city, municipality.

MR. TEEGARDEN. No; I think not.

MR. MICHENER. If it did do it, you would not want it, would you?

MR. TEEGARDEN. No; I would not want it. It certainly does not eliminate competitive bidding anywhere else, and I do not see how it would with the Government.

MR. HANCOCK. You would have to bid to the city, county, exactly the same as anybody else; same quantity, same price, same quality?

MR. TEEGARDEN. No.

MR. HANCOCK. Would they or could they sell to a city hospital any cheaper than they would to a privately-owned hospital, under this bill?

MR. TEEGARDEN. I would have to answer it in this way. In the final analysis, it would depend upon numerous questions of fact in a particular case. If the two hospitals are in competition with each other, I should say then that the fact that one is operated by the city does not save it from the bill. If they are not in competition with each other, then they are in a different sphere.

The facts of the situation are not present upon which to predicate a discrimination, in the nature of the case. I do not see that that question becomes any different under this bill from what it is under the present section 2 of the Clayton Act, for that bill also prohibits discrimination generally in the same terms that this does. But it differs in the breadth of the exceptions. That is the only difference between the two bills.

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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**No. 21168**

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LOGAN LANES, INC., an Idaho Corporation,  
*Appellant,*

VS.

BRUNSWICK CORPORATION, a Delaware Corporation,  
*Appellee.*

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF IDAHO, EASTERN DIVISION

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**REPLY BRIEF OF APPELLANT**

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**FILED**

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**Corrections in Citations in Brief of Appellant**

*Bruces Juices* should be 91 L ed 1219.

*Joseph E. Seagram* should be 384 US 35, 16 L ed 2d 336.

*Sunkist Growers* should be 370 US 19.



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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
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---

**REPLY BRIEF OF APPELLANT**

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**STATEMENT OF THE CASE**

The third, fourth and last sentences in the last paragraph on page 2 of Brief of Appellee contain controverted facts (Exhibits 1 through 6, R 55-64), and should not be assumed or used on this appeal. There is also nothing to indicate the Utah State Building Board can or does purchase "supplies" for schools.

Utah seems to have judicially held that in contemplation of law the Board is a body corporate, a legal entity; and it is capable of suing, of being sued, taking and holding property, and contracting in its own name and existing independent of the individuals who compose it. *Great American Indemnity*, p. 4 Brief of Appellee. Although appellant contends the question of "immunity" as correctly applied is not before the court, it would appear that Utah might likely have waived such immunity as concerns the activities of the Board in its purchases.

And see discussion: *Lauritzen v. Chesapeake Bridge and Tunnel District*, (D.C. E.Va. 10/20/66) 35 LW 2263.

## ARGUMENT

Appellee has noted an oversight in Brief of Appellant. We consider this and note further corrections. Appellant overlooked citing on page 61 immediately under *Standard Oil* the cause of:

*United States v. Trans-Missouri Freight Association*, (1896) 166 US 290 322-329, 41 L ed 1007, 1021-1023,

to compare this cause and *Standard Oil* with *Noerr Motor Freight* (incorrectly spelled as *Moller Freight*).

Immediately above the *Singer Mfg.* citation on page 28 and the *Union Carbide* citation on page 44, the cases:

*Continental Ore Co. v. Union Carbide and Carbon Corporation*, (1962) 370 US 690, 702-709, 82 S Ct 1404, 8 L ed 2d 777, 786-790;



*United States v. Sisal Sales Corp.*, (1927) 274 US 268, 47 S Ct 592, 71 L ed 1042,

each should have been cited.

We now reply to the brief of appellee by use of its heading references:

### **The Statutory Basis for the Cause of Action**

The Utah State Building Board is in the status of a buyer or representative of a buyer. It would appear in addition to 2(a) that Section 2(c) of Robinson-Patman might also be applicable to Brunswick in "granting" a "discount" or an "allowance" or "other compensation". The application of (c) does not depend upon a showing that any part of the allowance accrued to the benefit of the buyer and knowledge of such allowance by the buyer is immaterial.

*Fitch v. Kentucky-Tennessee Light and Power Co.*,  
(1943) 136 F 2d 12;

*Baysoy v. Jessop Steel Co.*, (1950) 90 F Supp 303;  
*Rangen, Inc. v. Sterling Nelson*, 351 F 2d 851;

on 2(d) application: *Flothill v. F.T.C.*, 358 F 2d 224.

### **Appellee's Argument II A, B and C**

Appellee confuses *sovereign immunity* with the *sovereign exemption doctrine*. The former is a substantive rule said to be based on jurisdiction precluding liability of a sovereign without its consent.

*Larson v. Domestic and Foreign Commerce Corp.*,  
(1948) 337 US 682, 93 L ed 1628.

The former applies when a state engages in governmental functions as contrasted to those matters in which it engages in a proprietary capacity; it applies *whether or not a statute is being construed or invoked*; it continues only from its vestigial antecedent of jurisdictional failure allowing the sovereign to immunize itself and its governmental officials from suit activity. Although "where a state's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere . . . subject to the constitutional power of the federal government, the question whether the state's act constitutes the alleged consent is one of federal law." *Pardin v. Terminal R. Co.*, 377 US 184, cited in *Lauritzen v. Chesapeake Bridge*, 35 LW 2264.

Appellant contends that the sovereign exemption doctrine is properly applied only as a protection of the enacting sovereign and only as a rule of construction when interpreting the application of a statute, and the exemption is based on the premise that the very sovereign enacting the legislation is presumed to intend the enactment not to be harmfully applied to itself.

Immunity is not involved in the present case because this suit is not to compel or restrain action by the state sovereign. Exemption is not involved as the United States Government enacting the Clayton and Robinson-Patman Acts does not seek to avoid one of its general statutes otherwise imposing a restriction on its remedial rights; in fact, such enacting sovereign was not a participant in any way in the discriminating activity and such activity was not for its benefit; and the enacting sovereign was affected by the discriminatory activity only in the sense that Congress

found that such practice was harmful to the common welfare of the citizenry and intended by such legislation to condemn such discriminatory sales as made by Brunswick. Correctly analyzed the *only* questions are whether Congress has the power, under those delegated to it by the Constitution, to enact such legislation to include sales to a state; and, if so, does the legislation enacted interdict sales of goods to states at a discriminatorily low price when such goods are used in competition with another buyer. Congress, as amply illustrated in our brief (pp. 29-31) had the power to enact this legislation and did *fully* exercise its commerce clause power. Since such full power does constitutionally embrace state competitive activities the act plainly applies.

Appellee in its Brief on page 7 and top of page 8 cites case authority and on pages 14 through 18 administrative interpretation none of which relate the sovereign exemption doctrine as protecting state action against federal enactments. *Hoar* plainly holds state law must give way to federal and each of the others relate the doctrine to the enacting sovereign. Appellee then cites on page 8 six other decisions which appellee asserts hold the federal antitrust laws do not *apply* to state action.

The confusion of appellee in distinguishing between jurisdictional *immunity* with overtones of regulatory power and the *exemption* rule of statutory construction is dramatically compounded by its failure to correctly define the very exemption doctrine itself.

*Hoar*, on its facts and from the language used, stands for the principle that a general *statute imposing remedial*

*restrictions or prohibitions* does not impose such on the government without clearly so indicating. There is no statute of such nature, federal or state, in this case. It is correctly used only when construing a law which limits and confines remedial rights and privileges. The doctrine is correctly applied to the remedies of a sovereign in the interest of the public benefit and of preserving public rights, revenues and property so that such defenses as limitations, anti injunction, and those rights the negligence and oversight of which public officials can affect, while generally available, cannot be raised to the sovereign action unless the sovereign so intends. The cases cited by appellee carry the doctrine no further, leaving for consideration the other "six" cases.

It might be here inserted that *Lowenstein and Olson v. Smith*, were each decided prior to enactment of the Clayton Act and specifically the addition in 1914 of the definitions in 15 USC 12. The very fact Congress enacted the Clayton Act (1914) and then the Robinson-Patman Act (1936), after numerous courts had held certain activity not invalid of the common law, federal or state enactments, grounded an inference that Congress intended to change the law and enlarge the remedies.

*Standard Fashion Co. v. Magrane Houston Co.*,  
(Mass 1919) 259 Fed 793, affm'd 258 US 346,  
66 L ed 653;

*Nashville Milk Co. v. Carnation Co.*, 355 US 373,  
2 L ed 2d 340.

Note should also be made of the clear congressional intent that no exemption apply to state action unless Con-

gress grant such explicitly as illustrated not only by the 15 USC 13 c and the cooperative exemptions and 2(b) of the McCarran-Ferguson Act allowing state regulation of the insurance industry, but also the Miller-Tydings Act and the McGuire Act amending Sec. 1 of the Sherman Act specifically to recognize the validity of state activity in the defined area otherwise disallowable on the federal pre-emption.

In *Lowenstein*, South Carolina specifically authorized in itself a monopoly. In doing so it was the sole violator alleged and as such a *necessary party* to any action as no private individual or corporation at all was involved in the complained of activities. The entire opinion is premised on immunity by the simple logic that the state being most necessary as the only party and enjoying its immunity as sovereign no action would lie as the jurisdiction fails. Contrast this cause to that case decided two years later arising out of the same lower court:

*Scott v. Donald*, (1897) 165 US 58, 17 S Ct 59, 41 L ed 632;

and also: *Ex Parte Young*, (1900) 209 US 123, 52 L ed 714.

In the problem of federal and state conflict the present United States District Court in South Carolina, in *Ayers v. Pastime Amusement Co.*, (10-4-66) 35 LW 2193, cites this ninth circuit in *Twentieth Century Fox Corp. v. Winchester Drive-In Theatre*, 351 F 2d 925:

“State law cannot be permitted to impede the effectuation of the national objectives expressed in the statutory schemes of the antitrust laws. We affirm the



lower court's determination that a federal rule should apply.' The principles of federal, and not state, law must govern the issues here since the causes of action arise and are predicated upon federal anti-trust statutes."

The Brief of Appellant has considered, *General Shale* (pp. 40-41), *Sachs* (p. 42), and *Parker* (pp. 46-49). Appellant submits the latter is concerned with whether and to what extent Congress intended to restrict state legislative regulatory schemes and *Lowenstein, Olson v. Smith* and *Parker* are grounded in immunity and affected by commerce power preemption rather than in the rule of construction claimed by appellee.

Certainly, federal courts have jurisdiction over treble damage antitrust actions even though state regulation is prominent.

*Board of Governors v. Transamerica Corp.*, (9 Cir 1950) 184 F 2d 311;

*Nippert v. Richmond*, 327 US 416, 66 S Ct 590, 90 L ed 760;

*Schwegmann Bros. v. Calvert Distillers Corp.*, 341 US 384, 95 L Ed 1035, 71 S Ct 745;

*Northern Securities Co. v. United States*, 193 US 197, 332, 334, 347, 48 L ed 679, 698, 703, 704, 24 S Ct 436;

*Maryland & Virginia Milk Producers Assoc. v. United States*, 362 US 458, 80 S Ct 847, 4 L ed 2d 880 (1960);

*United States v. Intl. Boxing Club of New York*, 348 US 236, 75 S Ct 259;

*United States v. Mfgs. Hanover Trust Co.*, (D.C. N.Y. 1965) 240 F Supp 867;

*Las Vegas Merchant Plumbers v. United States*, (9 Cir 1954) 210 F 2d 732.

Appellee in its brief states that the exemption applies to "the sovereign" or "a sovereign" and seems to mean any sovereign, and appellee summarizes the exemption applies to any transaction in which a sovereign is a party (note brief of appellee page 8, last paragraph; page 13, top paragraph). If by this is meant that the sovereign exemption doctrine "insulates" a transaction involving a sovereign, or that dealing with a sovereign in its exercise of a governmental function excludes private culprits then most certainly has our Supreme Court rejected the premise asserted by appellee.

*Continental Ore Co. v. Union Carbide*, (1962) 370 US 706, 82 S Ct 1404, 8 L ed 2d 777;

*United States v. Sisal Sales Corp.*, 274 US 268, 71 L ed 1042;

and to Robinson-Patman, see: *Baysoy v. Jessop*, 90 F Supp 313.

Appellee urges *E. W. Wiggins Airways, Inc., v. Massachusetts Port Authority* as sustaining its position. First, of most dramatic moment, is the obvious fact that the First Circuit in the cause cited does not in turn rely on or cite as sustaining authority any of the five (p. 7 top p. 8) cases or interpreting paper cited by Appellee dealing with the sovereign exemption doctrine. If this opinion was based, as appellee contends on the sovereign exemption doctrine, why did not the First Circuit by name rely on this doctrine

at some place in the opinion? The answer to this (and that five of those other "six" decisions are not mentioned in *Wiggins*) can be determined from noting: (1) that these cases do not hold the anti-trust laws do not "apply" to state action, and (2) the two premises on which the First Circuit opinion was actually based. These premises were: The Massachusetts Port Authority was engaged in a governmental function and relied upon governmental *immunity*. It was immune to private suit without its consent. The First Circuit took certain language from *Parker v. Brown* seeming to conclude that the immunity of a state itself was recognized by Congress so that the intent of Congress was not to impose liability on the state or its governmental agencies in performance of governmental functions. Second, and most relevant to this cause, the First Circuit held the non-governmental agencies, that is private parties, were not there responsible for the clear reason that on the merits these private parties did not violate any antitrust law. The court did not reach the question whether Butler-Boston or Butler would have been amenable if they had actually conspired, that is through their private action violated the anti-trust laws as the complaint failed to allege any such private action as part of a proscribed conspiracy. In our case, quite the contrary, Brunswick was the active discriminator and its private action caused the damage to the appellant. No conspiracy or collusion is required under Robinson-Patman.

While appellant suggests that subsequent decisions in analogous situations do indicate an extension of intended coverage of the antitrust laws precluding state regulatory

schemes the fact remains *Parker* gives appellee little comfort as we are not now dealing with jurisdiction or state regulatory activity.

*Parker* was concerned with the singular inquiry whether a state statute was rendered invalid. Action was brought against the state officers administering the pro-rate Act not for damages but to restrain the officers from enforcing the state act. The Supreme Court held there was no illegal interference with interstate commerce without citing authority for, naming or relying on a sovereign exemption doctrine. The case as presented was a classic "immunity" situation later so carefully categorized and compartmentalized in:

*Larson v. Domestic and Foreign Commerce Corp.*,  
337 US 682, 93 L ed 1628.

The hard question was whether the federal Congress in the exercise of its commerce power intended in the federal acts, including the Sherman Act, *to suspend a state law*. In the language quoted by appellee the court refused to nullify a state statute by restraining state officers from their official duties.

"Immunity from the antitrust laws is not lightly implied . . . We could not assume that Congress, having granted only a limited exemption . . . nonetheless granted an overall inclusive one . . . 'When there are two acts upon the same subject, the rule is to give effect to both if possible.'"

*California v. Federal Power Comm.*, 369 US 482,  
8 L ed 2d 54.

In the suit now before this court there is no attempt to suspend a state law as no Utah law conflicts with the

federal act, and for the same reason no restraint of state officers is involved.

Appellee misplaces the meaning under *Larson, Parker* and similar cases of the judicial significance to “‘restrain’ state action” replacing these with its words “‘applied to’ state action”. The federal anti-trust laws apply to state action. A completely different question is presented when determining if Congress intended to force on the states an immunity loss by allowing private parties to sue the state in the Federal Courts in restraint of state action. Thus, by following *Northern Securities* and *Union Pacific* (Appellant Brief p. 46) Justice Stone first noting that while the Sherman Act did not so allow suits *against states* in restraint of state action then in the language quoted in Brief of Appellant noted that neither did Congress authorize each state to in effect consider, adopt or destroy parts of the federal law by extending immunity beyond itself and its agents to “those” other “persons” falling in violation of the federal acts.

Of all doctrines for accommodation of regulatory statutes to the anti-trust laws, *pro tanto* exemption from the anti-trust laws by implication is to be sharply avoided.

*Carnation Co. v. Pacific Westbound Conference*,  
383 US 213, 15 L ed 2d 709 (reversing 9th Cir.,  
336 F 2d 650).

Resort to exemption from or repeal of an anti-trust law is to be avoided unless there is a “plain repugnancy” between the statutes with a most “unequivocally declared” Congressional purpose for inapplication of the anti-trust laws.



*United States v. Borden Co.*, 308 US 188, 197-206,  
84 L ed 181;

*United States v. Philadelphia National Bank*,  
(1963) 374 US 321, 350-355, 10 L ed 2d 915,  
937-947.

From this we find the enacting sovereign intends to have the anti-trust statutes considered in the broadest possible application even when in conflict with its own more recent enactments. Justice Story in *Hoar* was really applying without citing principles of *McCulloch v. Maryland*, 4 Wheat. 316, 4 L ed 579, decided two years earlier when he stated:

“It is not to be presumed, that a state legislature mean to transcend their constitutional powers; and, therefore, however general the words may be, they are always restrained to persons and things, over which the jurisdiction of a state may be rightfully exerted. And if a construction could ever be justified, which should include the United States, at the same time, that it excluded the state, it is not to be presumed, that congress could intend to sanction an usurpation of power by a state to regulate and control the rights of the United States.”

In *McCulloch*, Justice Marshall made a telling point as to the present case:

“In America, the powers of sovereignty are divided between the government Union and those of the states. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other.”

As stated in our former brief and referred to in *Lauritzen* there is substantial doubt whether Utah has the power

to conflict in any way with the application of the federal antitrust laws—an object committed to the Union. However, Utah has not attempted to avoid application of such laws in its transactions with private parties. It would appear manifest that the legislature of Utah did not direct or authorize a violation of the federal price discrimination statutes, and it only authorized the bids and purchases to be made consistent with federal and state laws. Appellee is “afforded no defense” from the fact the Board “in carrying out the bare act of purchasing” was acting “in a manner permitted” by Utah law. “There is nothing to indicate that such law in any way compelled discriminatory purchasing.” *Continental Ore Co.*, 370 US 690, 707, 81 L ed 2d 777, 788. Appellee cites *F.T.C. v. Sun Oil*, wherein the Supreme Court, after searching for congressional intent concluded while the generating cause for the Robinson-Patman Act may have been reaction to predatory use of mass purchasing power by chain stores neither the scope nor the intent of the act was limited to such suitation or set of circumstances. Congress through this act sought generally to obviate price discrimination practices threatening independent businessmen from whatever source and with the intent to assure within reasonable practicability that each business man had equal competitive footings so far as price was concerned. 371 US 505, 520, 9 L ed 2d 466, 479

### **Appellee’s Argument V and III**

The Brief of Appellee presents an argument V which generally challenges the position of appellant that the trial court erred in considering the motion to dismiss as a motion for summary judgment. Attention is called to the col-

loquy in the Transcript of Record Vol. II which is the recorder's transcript of the proceedings, May 20, 1966. It will be observed that the court chose to emphasize the only matter that day before the court and submitted for decision was on the motion to dismiss and not for summary judgment. (V. II, pp. 5-8, 18) Throughout the proceeding counsel for plaintiff made it clear that on the public use of the bowling facilities a factual question was presented in which further discovery was necessary. The Admissions and Interrogatory answers, while germane to a motion for summary judgment, would not be considered on motion to dismiss, and the court (pp. 2-8) made it clear that the reason for halting discovery was to test whether the allegations of the amended complaint stated a claim. In summary, the court stated he saw no reason not to grant an extension of time before allowing discovery stating to Plaintiff: "I don't know how you could be prejudiced". Counsel answered: "That is correct as to the motion to dismiss, there can't be. We have a complaint and motion to dismiss. The only time that it is relevant, the inference is, would be on the so-called motion for summary judgment which was raised in the brief. If there is a factual dispute, we would want to explore through factual determination, the school being open to the public and doing business. That is on the summary judgment and not the motion to dismiss."

"The Court: The Motion to dismiss is a Motion to Dismiss.

Mr. Johnson: On that, and the complaint, we are prepared to argue." (R. 7, pp. 5-18)

Appellant respectfully submits that the court was hearing the motion to dismiss as such and not as a motion for summary judgment, and appellant plainly made it known that if fact issues were presented then the plaintiff would want to explore this through discovery although its discovery efforts were so abortively halted in this same hearing. Appellee should have the burden to establish that plaintiff did not need discovery in order to meet the motion for summary judgment since defendant so moved after interrogatories had been served by plaintiff.

*Skouras Theatres Co. v. Radio-Keith-Orpheum Corp.*, 1966 Trade Cases 71, 729 (S.D. N.Y.).

#### **Appellee's Argument IV**

Appellant submits the procedural errors are based on much more than mere failure to comply with local rule 7. If Appellee means to suggest in the first sentence at the top of page 25 in its brief that the applicable local rule became "effective" on the date of the order, this is clearly misleading. Rule 7 as worded in the record became effective "from and after December 1, 1961" as an amendment to the rules adopted January 1, 1948, and as amended was applicable to this action. In a later 1966 amendment Rule 7 was modified in Rule 4 with the applicable language retained. However, as appellant stated in its Brief the more important offense was ignoring the spirit and letter of Rule 33 and Rule 36, F.R.C.P., and earlier Order of the District Court. Appellee, as defendant below, did not serve objections to the interrogatories as required by rule. Appellee did not deny or object to the requested admissions. The defendant could not have submitted points and authorities because the authority on manner to proceed, object, answer

or deny if not clear in the earlier court order is contained in the rules themselves, which the appellee did not follow but chose to disregard.

The objection is not hypertechnical, but, by avoiding the prescribed procedure and thus thwarting appellant's preliminary discovery and in the same instant inserting by affidavits a version of facts on competitive use of the goods it sold, the appellee in essence attempts to preclude appellant from developing the full facts in discovery through additional interrogatories or depositions. Appellant did attack the accuracy of statements in appellee's affidavits. Appellant should not be denied the right to cross-examine appellee's affiants. Appellant remains precluded from determination as to the relevancy of specific interrogatories to aid in its further discovery.

Appellee in last paragraph page 22 of its Brief seems to agree that for 13 c to apply the supplies must not be used competitively and argues a *resale* is necessary rather than merely competitive *use*. Appellant submits on the plain wording of Robinson-Patman and cases earlier cited this is error.

See also: Clairol, Inc., Trade Reg. Rep 17, 295 (F.T.C. Dkt 8647, 1965).

Respectfully submitted,

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I hereby certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules. I further certify that I mailed three copies of the above Reply Brief of Appellant by depositing three copies thereof, on the 28th day of November, 1966, with sufficient postage on the envelope in a United States Government mail receptacle addressed to the following:

L. F. RACINE, JR.  
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Pocatello, Idaho

---

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Attorney

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMUEL GOLD, HOWARD GUY  
HALBETT, and JOHN FRANK FUSCO,

Appellants,

-vs-

UNITED STATES OF AMERICA,

Appellee.

No. 21176

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FILED

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WM. B. LUCAS, JR.



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UNITED STATES COURT OF APPEALS

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	)	
Appellants,	)	
	)	
-vs-	)	No. 21176
	)	
UNITED STATES OF AMERICA,	)	<u>APPELLANTS' OPENING BRIEF</u>
	)	
Appellee.	)	
	)	

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JURISDICTIONAL STATEMENT

This is an appeal from the Judgment of the United States District Court for the District of Nevada, adjudging the Appellant Gold guilty as charged in Counts I and II of the Indictment and the Appellants Halbett and Fusco guilty as charged in Count II of the Indictment.

The offense occurred in the District of Nevada. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2, 371, 1462 and 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291 and 1294.

STATEMENT OF PLEADINGS AND FACTS

The Appellants and Antoinette Mary Fusco, on November 18, 1965, were charged by a two count Indictment in the United States District Court for the District of Nevada with violating





<sup>1</sup>  
[R.5-7].

The Appellants Gold and Halbett, prior to trial, filed a Motion for Return of Property and to Suppress Evidence [R.13-28], which Motion was joined in by the Appellant Fusco [R.T.40]<sup>2</sup>. The Motion to Suppress was heard during the trial when the obscene motion picture films were offered into evidence and the Motion was denied [R.T.219].

The trial Court, when the Government had rested its case in chief, granted Appellants Halbett's and Fusco's Motions for Judgment of Acquittal as to Count I of the Indictment [R.T.312]. The Appellants, at the close of all evidence, again moved for a Judgment of Acquittal, which Motions were denied by the trial Court as to Appellants Gold and Fusco and the ruling reserved as to Appellant Halbett [R.T.344-349].

The jury, after a three (3) day trial held on March 9-11, 1966, found the Appellant Gold guilty as charged in Counts I and II of the Indictment and the Appellants Halbett and Fusco each guilty as charged in Count II of the Indictment [R.38-39, R.T.418-420]. Each of the Appellants filed Motions for Judgment of Acquittal or In The Alternative For a New Trial [R.33], which the Court denied [R.37].

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1. "R" refers to Record on Appeal.

2. "R.T." refers to Reporter's Transcript of Trial Proceedings.



On April 2, 1966, Appellant Gold was sentenced and committed to the custody of the Attorney General for five (5) years on Counts I and II, to run concurrently. Appellant Halbett's sentence was suspended and he was placed on probation for five (5) years. Appellant Fusco was sentenced to five (5) years, his term of imprisonment to be consecutive to the sentence he was then serving. The Appellants appealed their respective convictions.

#### STATEMENT OF THE CASE

Special Agents from the Federal Bureau of Investigation initiated and maintained a surveillance of the premises at 19-1/2 Pacific Street, Henderson, Nevada for four days, between 8:00 o'clock A.M. and 6:00 o'clock P.M., during the period October 27, 1965 through November 2, 1965 [R.T.48-53,58]. The name EASTERN FILM LABORATORIES appeared on the glass door of the address [R.T.51].

During the four day surveillance the Appellants Gold and Halbett were both observed, by Special Agents, entering and leaving the premises on various occasions [R.T.49-53]. The Agents' point of surveillance was directly across the street from the premises at 19-1/2 Pacific Street.

The Appellants Gold and Halbett, on November 3, 1965,



both arrived at the Pacific Street address, during the morning hours, in a blue Cadillac automobile. At approximately 2:40 o'clock P.M., the two Appellants were both observed loading five cartons into the Cadillac. This loading of the Cadillac took place at approximately 2:40 o'clock P.M. [R.T.59-61]. Special Agent Salisbury, after the Cadillac was loaded, observed Appellants Gold and Halbett leave the Pacific Street premises together in the Cadillac, with Appellant Gold driving [R.T.63-64].

Approximately an hour later, Agent Salisbury and other Special Agents, observed the Cadillac parked at the United Air Lines Freight Office at McCarran Field, Las Vegas, Nevada. The trunk of the Cadillac was open and five cartons, similar to the cartons that were loaded at the Pacific Street address, were on a set of weighing scales [R.T.62-63].

Special Agent Drake also observed the Appellants Gold and Halbett pack the cartons in the Cadillac and leave together with Gold driving the Cadillac [R.T.73]. At approximately 3:05 o'clock P.M. of the same day, Agent Drake again observed the Cadillac being driven by Gold, but without the Appellant Halbett [R.T.74]. Special Agent McFaul was at or near the United Air Lines Freight Office when the Appellant Gold arrived, alone, and with Appellant Halbett. The cartons were taken out of the Cadillac and placed on a scale by an United Air Lines employee [R.T.79-82].





air bill for the five cartons that were brought to United Air Lines [R.T.83-86]. Hooker did not identify or recognize the person from whom he obtained the cartons [R.T.87]. However, Special Agent Doyle observed the Appellant Gold park at the rear of United Air Lines shipping area, and further observed Art Hooker unload the cartons from the Cadillac and place the cartons on the scale [R.T.150-151].

Agents Doyle and Murray then contacted United Air Lines Customer Service Manager Dunne and advised him that the five cartons were believed to contain something other than the contents of the air bill of lading [R.T.190]. Dunne, in response to the situation then presented, instructed the freight supervisor to take the shipment into the air freight room. The description of the contents of the air bill read-- "electrical controls". When the carton was opened, film cans were found inside [R.T.104]. Dunne opened one of the film cans, looked at the films and notified the F.B.I.

Agents Doyle and Murray took three reels of film to a United Air Lines Office and ran the film on a projector. The three reels of film depicted oral sodomy, sexual relations between opposite sexes, and oral copulation [R.T.153-154]. Dunne testified that it was his decision to initially open the carton [R.T.105]. The five cartons were never placed on a United Air



than the United Air Lines Freight Dock [R.T.122].

The following day, November 4, 1965, F.B.I. Agents executed a search warrant at the United Air Lines Office and seized the five cartons, including the carton that had previously been opened by Dunne [R.T.136-138]. The five cartons contained 200 reels of film in each carton [R.T.156]. Each reel of film was examined by the Agents [R.T.161]. The Appellants' trial counsel selected a reel of film from each carton, viewed the film, and stipulated that the films depicted obscene scenes [R.T.230-233].

In the afternoon of November 4, 1965, at the United Air Lines freight office, at Newark, New Jersey, a woman and a man identified as John Fusco, stopped at the freight counter to pick up a shipment for a Mrs. Rocco [R.T.236-238]. The couple had a piece of paper on which an air bill number was written [R.T.237]. The freight agent checked, and determined the requested shipment wasn't on hand [R.T.242]. The air bill, in evidence as Exhibit 13, contained the same bill number the couple presented [R.T.246].

Special Agent Jenkins was stationed at the Newark Airport and observed the Appellant Fusco and Antoinette Fusco at the United Air Lines freight counter when they called for the shipment [R.T.253]. The next day, F.B.I. Agents arrested





Jersey. The Agents searched her apartment incident to her arrest [R.T.256-257]. The arresting Agents, among other evidentiary items, found and seized Western Union Money Order Receipts, on which the name Samuel Gold appeared, which receipts were admitted into evidence as Exhibit 15 [R.T.263]. The Appellant Fusco was arrested on the same day in Jersey City, New Jersey [R.T.265].

The Appellants Gold and Halbett filed a Motion for Return of Property and to Suppress Evidence [R.11-17], which Motion was joined in by Appellant Fusco [R.3]. The Motion was argued and denied by the Court [R.T.183-219]. The Appellants, when the Government rested its case, moved for Judgment of Acquittal as to all counts [R.T.285-312]. The Motions for Appellants Halbett and Fusco were granted as to Count I [R.T.312]. The Appellants, when all the evidence was closed, again moved for Judgment of Acquittal for the remaining counts. The trial Court reserved ruling on Halbett's Motions and denied Gold and Fusco's Motions [R.T.344-349]. The Court, after the jury returned verdicts of guilty as to the remaining counts, denied Appellant Halbett's Motion [R.T. 424-425]. The Appellants, within five days after return of verdicts, filed Motions for Judgment of Acquittal or in the Alternative for a New Trial [R.31-35, 33-36], which Motions were denied [R.3].



1. The trial Court abused its discretion when, during the voir dire examination, it refused to inquire into the religious background of each juror.

2. The trial Court erred in taking Judicial notice that United Air Lines was a common carrier.

3. The trial Court erred in not granting Appellant's Motions for Judgment of Acquittal at the conclusion of the Government's case in chief, when all evidence had been closed, when it denied the Motion for Judgment of Acquittal or In The Alternative For a New Trial.

#### S U M M A R Y

The Appellant Gold was indicted, tried and convicted for violating Title 18, United States Code, Section 1462. All of the Appellants were indicted, tried and convicted for violating Title 18, United States Code, Section 371.

The Appellant Gold contends that, but for the errors committed by the trial Court in Judicially noticing United Air Lines was a common carrier and that as a matter of law Section 1462 had been violated, the evidence was insufficient to show Appellant Gold violated the Section and the Appellant Gold's Motion for Judgment of Acquittal should have been granted.

The Appellants jointly and severally contend that the evidence before the Court was insufficient to show that a conspiracy had been formed by the Appellants and that any act



## A R G U M E N T

### I.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN, DURING VOIR DIRE EXAMINATION, IT REFUSED TO INQUIRE INTO THE RELIGIOUS BACKGROUND OF EACH JUROR.

The Appellants were charged by Indictment with causing to be transported and conspiring to have transported by a common carrier, in interstate commerce, obscene, lewd, lascivious and filthy motion picture films [R.5-7].

The Indictment was read by the Clerk to the jury prior to voir dire examination [R.T.5-8]. The trial Court conducted its voir dire examination of the jurors [R.T.8-17] and upon completing voir dire, the Court inquired of Appellants' trial counsel whether they had any questions [R.T.17]. The Court was requested to make inquiry concerning the religious background of each juror. The Court agreed to inquire only concerning the jurors' religious denominations [R.T.17]. However, the Court later refused to make such inquiry, holding that the jurors' religious background had nothing to do with the jurors' qualifications to sit in this trial [R.T.34].

The Appellants contend the Court's refusal, to make inquiry as requested, was an abuse of discretion and prejudicial error.





ground, training and participation are crucial to the juror's composition and makeup when he sits as a juror in an obscenity case. The Court's refusal to make this crucial inquiry, closed the door on the Appellants and when Appellants exercised their peremptory challenges, they were required to exercise their challenges blindly without the benefit of this all important knowledge.

The rule in the Ninth Circuit, as in all of the Circuits, is that questions to be asked the jury on voir dire examination are wholly a matter of discretion for the trial Court. Alvarez v. United States, 282 F.2d 435, 437-438, (9th Cir. 1960). The trial Court exercised its discretion and kept the Appellants from knowing the religious denomination of each juror. It is common knowledge that some religious groups take a more narrow view of obscenity than other religious groups. The Appellants were effectively precluded from excusing any jurors for reasons of religion or morality, when one of the issues before the Court was the obscene nature of the films.

By contrast, it was held in United States v. Clancy, 276 F.2d 617 (7th Cir. 1960), that asking, whether a prospective juror taught Sunday School and would be prejudiced against anyone accepting wagers, was not an abuse of discretion. It can logically be argued that refusing to make an inquiry in this case was an abuse of the Court's discretion.



THE TRIAL COURT ERRED IN TAKING JUDICIAL NOTICE

THAT UNITED AIR LINES WAS A COMMON CARRIER.

The Appellants were charged by Indictment with violating Title 18, United States Code, Sections 371 and 1462 [R.5-7]. The Appellant Gold alone stands convicted of violating Section 1462, as charged in Count I of the Indictment and all of the Appellants stand convicted of violating Section 371 as charged in Count II of the Indictment.

The language of Title 18, United States Code, Section 1462 makes it a crime for anyone to knowingly use a common carrier for carriage in interstate commerce of any obscene, lewd, lascivious and filthy motion picture film. The charging portion of Count I of the Indictment alleged that Appellant Gold "did knowingly use...a common carrier that is United Air Line, for the carriage in interstate commerce from Clark County, Nevada to Hoboken, New Jersey..." of the prohibited items. The elements for a Section 1462 violation are:

- (1) Knowingly use a common carrier
- (2) For carriage in interstate commerce of
- (3) Obscene, lewd, filthy and lascivious motion picture film.

The Government requested the trial Court to take Judicial notice of the fact that United Air Lines is a common





objected to the request on the ground the Court could not Judicially notice an element of the crime and the objection was sustained [R.T.238-240].

When the Government rested its case in chief, the Appellants moved for a Judgment of Acquittal [R.T. 285-312]. The Appellants urged, as one of their grounds for acquittal, that the Court could not take Judicial notice that United Air Lines was a common carrier [R.T.297,312]. The trial court, at least impliedly, reversed its ruling to Appellants' objection that it could not Judicially notice United Air Lines was a common carrier and took Judicial notice [R.T.312].

Each of the Appellants entered pleas of not guilty to Counts I and II of the Indictment [R.2-3] and placed the burden of proving the elements of the crimes charged upon the Government. "Where a defendant pleads not guilty, he places upon the government the burden of proving all essential facts alleged. . ." United States v. Hoyland, 264 F.2d 346 (7th Cir. 1959). The Appellants' pleas of not guilty placed the burden of proof on the Government, and this included proof that United Air Lines was a common carrier. "The government must prove every essential element of the offense." Newsom v. United States, 335 F.2d 237, 238 (5th Cir. 1964).



the only proof offered by the Government that United Air Lines was a common carrier, was the testimony of United Air Lines Employees, Customer Service Manager Dunne [R.T.101-123], and Schuerman [R.T.236-255], neither of whom were in executive positions and could prove other than vocally that United Air Lines was a common carrier. The Government did offer into evidence a United Air Lines CAB Tariff [R.T.107] not for the purpose of establishing the fact that United Air Lines was a common carrier, but apparently as Witness Dunne's authority for inspecting and opening one of the cartons the Appellant Gold had shipped [R.T.117].

Judicial notice has been defined as "...a substitute for the conventional method of taking evidence to establish facts." Grand Opera Co. v. Twentieth Century-Fox Film Corp., 235 F.2d 303 (7th Cir. 1956). Unquestionably, interstate transportation by a common carrier were elements of the crime charged that had to be proved, and for which Judicial notice could not be substituted.

When Judicial notice has been taken of the fact that transportation charged was interstate commerce, notice has usually followed a guilty plea and admission of all the facts pleaded. Cf Walker v. United States, 154 F.Supp. 648, 650 (U.S.D.C.D. N.J. 1957).

"Whether an air carrier is a common carrier is determined by the same principles as are applied in the



cases of carriers by other means...A carrier is a common carrier if it holds itself out to the public as willing to carry all passengers for hire indiscriminately...."

Arrow Aviation, Inc. v. Moore, 266 F.2d 488, 490 (8th Cir. 1959). Although the Government offered the testimony of Mr. Schuerman [R.T.240-242,249], his testimony fell short of establishing United Air Lines as a common carrier as defined in the Arrow Aviation Case, supra.

The proof required in this case to establish United Air Lines as a common carrier, is not unlike the proof required in proving a bank is a Member Bank or is insured by the Federal Deposit Insurance Corporation, for a violation of Title 18, United States Code, Section 2113(a-d). In the bank cases, an authenticated certificate from the Comptroller General of the United States will suffice, or testimony by an appropriate bank officer, together with the bank's certificate is sufficient.

The Government offered no documentary or testimonial evidence that United Air Lines was a common carrier. Title 49, United States Code, Section 1371, contemplates that air carriers shall have a Certificate of Public Convenience issued by the Civil Aeronautics Board. Possibly a certified copy of such Certificate would have established the common carrier status of United Air Lines, but its status could not be established by Judicial notice. "The Court itself





cannot take judicial knowledge of facts to establish or disprove the very issue on which the case is tried...."

Exparte Chin Yoke Tung, 2 F.Supp. 549 (U.S.D.C. W.D. Wash. N.D. 1932).

The Eighth Circuit Court of Appeals in Alexander v. United States, 271 F.2d 140 (1959), held that Judicial notice could not be taken of the character of a neighborhood, if the character of the neighborhood was relevant upon the issues in the case. The Judicial notice taken in this case was relevant, had a direct bearing on the issues in the case, and was prejudiced.

### III.

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT GOLD'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNT I OF THE INDICTMENT.

The Appellant Gold, on three separate occasions, moved the Court to enter a Judgment of Acquittal as to Count I. When the Government rested its case in chief [R.T.285-290]; when all evidence was closed [R.T.345-349]; and after the jury returned its verdict [R.31-35]. All Motions were denied.

The prohibited obscene motion picture film, packaged in five cartons, was transported to McCarran Field by Appellant Gold [R.T.149-150]. The Appellant drove his



Cadillac to the United Air Lines freight loading area, where Freight Agent Hooker unloaded the car and placed the five cartons on a scale [R.T.98-101] and prepared a straight air bill for the five cartons [R.T.84-85,92]. The Appellant Gold paid \$45.27 cash for the freight charges [R.T.87-88]. The cartons were next moved from the scale into United Air Lines Air Freight Room [R.T.104]. Mr. Dunne, United Air Lines employee, decided the cartons, after opening one carton and noting the contents, should not be shipped [R.T.109]. The cartons stayed in Dunne's office until the following morning [R.T.110]. The five cartons moved no further along than the freight dock area of United Air Lines [R.T.122] and did not start on a journey in interstate commerce.

The Statute, Title 18, United States Code, Section 1462, contemplates and requires carriage in interstate commerce before the Statute is violated. Section 1462 was amended in 1958. See 1958 U.S. Code Cong. and Admin. News, p. 4012. Prior to the Amendment, the offense denounced by this section was complete when the proscribed articles were knowingly deposited for carriage in interstate commerce.

The 1958 Amendment substitutes the word "uses" for the word "deposits". Conceivably, prior to the 1958 Amendment, a violation could occur when the proscribed articles were merely deposited with a common carrier for carriage in inter-





interstate commerce is "used".

The Statutory or legislature history of Section 1462 and its predecessor, Section 396, is scant and does not answer or solve the dilemma presented by this appeal--did the Section require, for its violation, more than merely delivering the film to the United Air Lines freight counter.

The 1958 Amendment was brought about by the Tenth Circuit's decision in United States v. Ross, 205 F.2d 619 (10th 1953). The purpose of the Amendment was to make the offense continuous and prosecutable in two districts.

The Supreme Court of the United States in United States v. Alpers, 338 U.S. 680, 70 S.Ct. 352, 94 L.Ed. 457 (1950) considered the legislative purpose of Section 396, predecessor to Section 1462 and stated "The obvious purpose of the legislation under consideration was to prevent the channels of interstate commerce from being used to disseminate any matter that. . .communicates obscene, lewd, lascivious or filthy ideas." 338 U.S. at page 683, 70 S.Ct. at page 354. From this statement it is clear that interstate commerce must be used before the Section is violated. Section 1462, as amended, makes it a crime to use interstate commerce either for carriage or receipt of the obscene matter. The individual could not be charged with receiving the obscene matter from the common carrier, unless the common carrier



had transported the matter in interstate commerce, so it would logically follow that a person could not be charged, as Appellant Gold has been charged, unless the common carrier was used to carry the obscene matter in interstate commerce (emphasis added).

Appellant's position is even more plausible, if for some physical impossibility (nationwide air strike) the obscene matter was never transported in interstate commerce and remained at the freight depot. Certainly, the avenues of commerce could not thereby be saturated with the obscene matter the Statute was enacted to curb.

A review of the reported decision does not answer the question--what movement in interstate commerce is necessary to constitute a violation of Section 1462? The violation has occurred when the obscene matter has actually been deposited and transported in interstate commerce. Rodd v. United States, 165 F.2d 54 (9th Cir. 1947); and when the obscene matter has actually been taken from a common carrier after carriage in interstate commerce. United States v. Hochman, 277 F.2d 631 (7th Cir. 1960), Alexander v. United States, 271 F.2d 140 (8th Cir. 1959). But never has a violation been sustained by mere delivery to a common carrier's freight office.



Congress has seen fit by legislation to proscribe and make criminal, certain activities, but only if the activity takes place in interstate commerce. Transporting a stolen motor vehicle, a violation of 18 U.S.C. §2312; transporting forged or stolen securities, a violation of 18 U.S.C. §2314; transporting women for the purposes of prostitution, a violation of 18 U.S.C. §2421. To constitute a violation of any of these statutes, there must be interstate transportation. The unit of prosecution rule is aimed at the interstate commerce. The same reasoning applies to Appellant Gold's charged violation of Section 1462. There can be no violation unless there has been interstate carriage of the obscene matter.

The Appellant Gold was found guilty as to both Counts of the Indictment. His sentence on Count I and Count II was to run concurrently [R.39]. Although, the sentence is concurrent, the failure of the Government to prove interstate transportation of the obscene matter is of such prejudicial nature that the entire trial was infected and the Appellant was denied a fair trial as announced by this Circuit in Page v. United States, 356 F.2d 337, 338 (9th Cir. 1966).





THE COURT ERRED IN DENYING APPELLANTS' MOTIONS TO  
SUPPRESS THE OBSCENE FILM.

The Appellants, collectively and individually through their counsel, objected to the admission of the obscene film into evidence on the ground the five cartons of film were seized as a result of an unlawful search and seizure [R.T.183-219, 233, 285; R.31-35, R.33-36(Fusco)].

United Air Lines Customer Service Manager Dunne, testified that but for Special Agent Doyle contacting him concerning the five cartons, the cartons would not have been disturbed. Federal Agents, without a search warrant, could not lawfully open the five cartons.

The cartons were shipped by a straight air bill for delivery to the consignee [R.T.92]. But for Agents Doyle and Murray's intervention the one carton would not have been opened. "If it was not permissible for them [F.B.I.] to search or seize themselves, it was not permissible for them to have another person search for them and deliver up for their seizure." [Dissenting opinion] Circuit Judge Merrill in Marshall v. United States, 352 F.2d 1016 (9th Cir. 1965). It would have been reasonable for the Agents to obtain a search warrant. The search of the carton by Dunne occurred at approximately 3:50 o'clock P.M. [R.T.102].



The next normally scheduled flight would have left at 1:00 o'clock A.M. the next morning [R.T.109].

The act of F.B.I. Agent Doyle in contacting Dunne was similar to the act of an officer going to an air lines freight office and inspecting a defendant's luggage, which search this Circuit held was unlawful without a search warrant, but held the Government had sustained the burden of proving it was not practical to obtain a search warrant. Hernandez v. United States, 353 F.2d 624, 626 (9th Cir. 1965). Here, it was practical for the Agents to secure a search warrant. The cartons had been instructed to the care of United Air Lines and the search of the cartons by Dunne was as unlawful as a search by the Agents and the obscene matter discovered thereby should have been suppressed. The search of the carton was not incident to Gold's arrest, nor was the requirement of a search warrant obviated by the emergency presented.

V.

THE TRIAL COURT ERRED IN DENYING APPELLANTS HALBETT'S AND FUSCO'S MOTIONS FOR JUDGMENT OF ACQUITTAL AS TO COUNT II OF THE INDICTMENT.

The Appellants together stand convicted of Count II of the Indictment, the Conspiracy Count [R.39(Fusco), R.38-39]. The Appellants, respectively, moved the trial Court for





Judgments of Acquittal as to Count II [R.T.292-297,345-349, R.33-36 (Fusco), R.31-35], which Motions were denied, even though the trial Court felt the proof of conspiracy was tenuous as to Halbett [R.T.349].

The facts show the Appellants Halbett and Gold entered the premises together at 19-1/2 Pacific, Henderson, Nevada, on October 27, 28, 29, 1965 [R.T.48-54] and on November 2 and 3, 1965 [R.T.58-60]. The two men, during this period of days, entered the premises together, left occasionally during the day, and left together at night. They were in the premises usually between 9:00 o'clock A.M. and 5:00 o'clock P.M.

On November 3, 1965, the Appellants Halbett and Gold arrived together in a blue Cadillac [R.T.60]. Shortly after the noon hour, the two men loaded five cartons into the Cadillac and left the area together in the Cadillac, with Gold driving [R.T.61-64]. Less than an hour later the Cadillac, driven by the Appellant Gold, was driven to and parked at the United Air Lines Freight Office where the five cartons were unloaded [R.T.78-80].

The Appellant Halbett's entire participation in the conspiracy amounted to nothing more than loading five sealed cartons into the blue Cadillac and driving away. There was no proof, direct or circumstantial, that



Halbett had any knowledge of the obscene nature of the film. In fact, the following day, November 4, 1965, the Eastern Film Laboratory at 19-1/2 Pacific, was searched by F.B.I. Agents, and some 1500 reels of film were seized, of which by stipulation only 17 reels could be defined as obscene [R.T.328-331].

The facts before the Court and jury, touching on Appellant Halbett's participation in the conspiracy, is consistent with innocence.

There must be an intent to participate in a conspiracy, but to have the intent, knowledge must be established, clearly and unequivocally. Dennis v. United States, 302 F.2d 5 (10th Cir. 1962). The same degree of criminal intent necessary under a substantive offense must be proved to sustain a conspiracy to commit the offense. Danielson v. United States, 321 F.2d 441 (9th Cir. 1963). There must be proof that Halbett did some act or made some agreement, which manifests an intent to participate in the conspiracy. Bridges v. United States, 199 F.2d 811 (9th Cir. 1952).

Application of these several legal principles to Halbett's conspiracy clearly show that proof was insufficient and had the Court, as requested, applied "isolated transaction rule" announced in United States v. Bentvena, 319 F.2d 916 (2nd Cir. 1963), judgment of acquittal would



have been entered for Appellant Halbett.

There was no evidence to connect the Appellant Fusco to the alleged conspiracy. Appellant Fusco appeared at the United Air Lines freight counter in Newark, New Jersey, with a woman, identified as Antoinette Fusco. The two wanted to pick up a shipment for a Mrs. Rocco [R.T.236-238]. The woman did most of the talking. The two had a shipping number on a piece of paper [R.T.243-246]. The shipment had not arrived--so the Appellant and the woman left the airport area [R.T.256].

There was no other evidence to connect the Appellant Fusco with the alleged conspiracy. The record shows the woman was the moving party and from whose apartment Exhibits 15 through 18 were taken. Nothing appears in Exhibits 15 through 18 to show the Appellant Fusco was a member of the alleged conspiracy.

There being no proof to show Appellants Halbett and Gold were conspirators, the trial Court erred in denying Appellants Halbett's and Fusco's Motions for Judgment of Acquittal.

#### C O N C L U S I O N

The trial Court erred, and the Judgment, accordingly,





should be reversed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

**RAYMOND E. SUTTON**

---

RAYMOND E. SUTTON



CERTIFICATE OF SERVICE

I, RAYMOND E. SUTTON, certify that, as counsel for the Appellants in the within appeal, on the \_\_\_\_ day of September, 1966, I personally served the Attorney for the Appellee, by mailing three copies of Appellants' Opening Brief to JOSEPH L. WARD, United States Attorney for the District of Nevada, at Federal Building, Las Vegas, Nevada.

I certify under the penalty of perjury that the above and foregoing is true and correct.

---

RAYMOND E. SUTTON





No. 21,176

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

SAMUEL GOLD, HOWARD GUY HALBETT,  
JOHN FRANK FUSCO,

*Appellants,*

VS.

UNITED STATES OF AMERICA,

*Appellee.*

**Appeal from the United States District Court  
for the District of Nevada**

**APPELLEE'S ~~ANSWERING~~ BRIEF**

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**FILED**

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VS.

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**Appeal from the United States District Court  
for the District of Nevada**

**APPELLEE'S ANSWERING BRIEF**

---

**I.**

**STATEMENT OF JURISDICTIONAL FACTS**

An indictment was returned in the United States District Court for the District of Nevada in two counts, the first count charging the Appellants and a co-defendant, Antoinette Mary Fusco, with violation of Title 18, United States Code, Sections 1462 and 2, and the second count charging the Appellants and Antoinette Mary Fusco with violating Title 18, United States Code, Section 371 (R. 5).<sup>1</sup>

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<sup>1</sup>"R." as used herein refers to the Record on Appeal. Unless otherwise indicated, the reference will be to the Record on Appeal of Appellants Gold and Halbett. References to the separate Record on Appeal as to Appellant Fusco will be so designated.

Under the provisions of Title 18, United States Code, Section 3231, the District Court had original jurisdiction. Upon the jury's verdict of guilty each Appellant was sentenced. Appellant Gold was sentenced with respect to both counts I and II (R. 39); Appellant Halbett was sentenced with respect to count II only (R. 38); and Appellant Fusco was sentenced with respect to count II only (R-Fusco 39). From these judgments of the District Court the Appellants have now appealed.

It is conceded that this Court has jurisdiction over appeals from such final decisions of a District Court under the provisions of Title 28, United States Code, Section 1921, and by virtue of Rule 37(a) of the Federal Rules of Criminal Procedure.

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## II.

### STATEMENT OF THE CASE

This is an appeal from the convictions of Samuel Gold, Howard Guy Halbett and John Frank Fusco, in the United States District Court for the District of Nevada. A co-defendant Antoinette Mary Fusco was prosecuted separately under the provisions of Rule 20 of the Federal Rules of Criminal Procedure in New Jersey.

The indictment (R. 5) charged the Appellants in count I thereof with using and causing to be used a common carrier for the carriage in interstate commerce of obscene motion picture film in violation of



Title 18, United States Code, Sections 1462 and 2. Count II charged the Appellants with conspiring to violate Title 18, United States Code, Section 1462, all in violation of Title 18, United States Code, Section 371.

The jury convicted Appellant Gold of both counts, and found the Appellants Halbett and Fusco guilty of count II only (T. 418-423).<sup>2</sup>

The evidence presented to the jury showed that agents of the Federal Bureau of Investigation commenced a surveillance during business hours of Eastern Film Laboratories, 19½ Pacific Street, Henderson, Nevada, on October 27, 1965, which surveillance was maintained between 8:00 A.M. and 6:00 P.M. through October 29, 1965, and was resumed November 1, 1965 to continue through November 3, 1965 (T. 49-53, 59-60). No significant activity was noted at the premises until approximately 2:40 P.M. on November 3, 1965, when Special Agent Salisbury observed Appellants Gold and Halbett loading cartons into a Cadillac automobile (T. 61). The surveilling agents observed Appellants Halbett and Gold leave the premises and at approximately 3:20 P.M. the vehicle was observed as was Appellant Gold at the United Air Lines freight dock at McCarran Field, Las Vegas, Nevada (T. 62). Appellant Gold was then observed to deliver the five cartons to United Air Lines' Station Agent Arthur Hooker (T. 150, 169).

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<sup>2</sup>"T." as used herein refers to the Reporter's Transcript of the Proceedings.

Mr. Hooker completed the air waybill (Exhibit 3) and the freight charge of \$45.20 was paid in cash (T. 85, 88).

The waybill was made up from the information supplied in part by the shipper to Mr. Hooker and reflected that the cartons contained electronic controls. The shipping document (Exhibit 3) as well as the labeling on the cartons themselves reflected that the shipper was Pont Distributors, 1020 South First Street, Las Vegas, Nevada (T. 210). Special Agent Murray had previously found that 1020 South First Street, Las Vegas, was a non-existent address and the agent had been unable to identify any company by the name of Pont Distributors (T. 126, 127).

Upon the shipment's being delivered to United Air Lines, and after Appellant Gold had departed from the airport, United Air Lines' Customer Service Manager James M. Dunne was contacted by Special Agent Doyle and Special Agent Murray and informed that the agents had reason to believe that the description on the air waybill of the contents of the shipment was inaccurate, and that the shipper's address was non-existent (T. 118, 189-190). Mr. Dunne was not informed of the suspected contents of the shipment (T. 118, 190). Mr. Dunne, upon receiving this information, indicated that he would consider the matter (T. 191) and thereafter made some investigation of the situation (T. 105).

Mr. Dunne thereafter decided to open one of the cartons (T. 115) pursuant to the carriers' right of

inspection under their tariff (Exhibit 9). At the time of the opening only an airline supervisor was present (T. 118, 119). The decision to examine the contents of the carton was his own and the opening was not accomplished at the request or instruction of the agents (T. 105), although he would not have opened the shipment had not he been contacted by the agents and informed of their suspicions.

Upon examining the contents of the carton Mr. Dunne looked at a portion of the film and determined to contact the agents (T. 108), who responded an hour or so later (T. 121). Dunne showed the film to the agents who made arrangements for a projector and then examined by use of the projector three of the rolls of film (T. 153). After determining the nature of the films the agents advised Mr. Dunne to hold the shipment under lock and key, Dunne having determined not to repackage the shipment and send it (T. 109, 110). The following morning at approximately 10:00 o'clock the agents returned with a search warrant (Exhibit 12) and seized the shipment.

The agents were aware of the probability that the shipment contained obscene film (T. 185, 186).

Roger Schuerman, an air freight agent for United Air Lines at the Newark, New Jersey airport testified that on November 4, 1966, Appellant John Fusco and an unidentified woman came to his counter to pick up a shipment and made reference to the air waybill number (T. 237). The unidentified woman gave Schuerman a description of the shipment but was

corrected by Appellant Fusco as to the number of cartons and the approximate weight (T. 243, 244).

Mr. Schuerman further testified that United Air Lines services Newark, New Jersey, Cleveland, Chicago, Pittsburgh, Salt Lake, Las Vegas, Reno, Denver and Omaha, among other places (T. 242), and that United Air Lines' service is available to anyone who wishes to pay for it (T. 241). Evidence further showed that tariffs had been issued for United Air Lines by the Civil Aeronautics Board (Exhibit 9) and that it was a common carrier engaged in interstate commerce (T. 249). The Trial Court, in addition, took judicial notice that United Air Lines is a common carrier engaged in interstate commerce (T. 341).

Agent Jenkins of the Federal Bureau of Investigation in New Jersey observed Appellant Fusco and Antoinette Fusco at the United Air Lines Office at the Newark Airport on the afternoon of November 4, 1965 (T. 255). On the following morning he arrested Antoinette Fusco in Jersey City, New Jersey at her residence where Western Union money order receipts (Exhibit 15), bearing the name of Samuel Gold, were seized.

Counsel and the Appellants stipulated that the film seized and admitted into evidence (Exhibits 8C, 8D, 8E, 4B, 5B, 6B and 7B) depicted obscene scenes as the term has been defined by the Supreme Court (T. 394).

Motions for acquittal were made by Appellants at the close of the Government's case (T. 285, 297) and

granted as to Appellants Halbett and Fusco as to count I only. They were denied in all other respects. The motions were renewed at the close of all evidence (T. 344) and denied as to Appellants Gold and Fusco (T. 349). Ruling was reserved with respect to Appellant Halbett (T. 349), but denied following the verdict (T. 424). Appellants filed a written motion for judgment of acquittal or in the alternative for a new trial (R. 31, R-Fusco 33), which motions were also denied (R. 36).

Appellants have prosecuted this appeal specifying as error the following:

1. That the Trial Court abused discretion in refusing to inquire into the religious background of the jury venire.

2. That the Trial Court committed error in judicially noticing that United Air Lines is a common carrier.

3. That the Trial Court committed error in denying Appellants' several motions for judgment of acquittal or for a new trial.

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### III.

#### **SUMMARY OF ARGUMENT**

##### 1

The Trial Court properly exercised its discretion in refusing to inquire into the religious affiliations of the prospective jurors.

The Trial Court properly took judicial notice that United Air Lines is a common carrier and alternatively, any error committed did not prejudice the Appellants.

The verdicts were adequately supported by the evidence and therefore the Trial Court properly denied the several motions for acquittal or for a new trial.

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#### IV

#### ARGUMENT

#### THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO INQUIRE INTO THE RELIGIOUS AFFILIATIONS OF THE PROSPECTIVE JURORS

In the course of selecting the jury counsel for Appellants Gold and Halbett requested the Court as follows (T. 17):

“Mr. Sutton: Excuse me, Judge.

“I would like you to inquire, if the Court please, the religious background of each of these individuals, that is, L.D.S. church or Catholic church, and if they are active in the church.

“The Court: Now, you are asking me to find out how religious they are? I won’t inquire into that. I will ask them the denomination, if any, to which they belong.”

The Court made the following observation prior to the time for challenging jurors (T. 34):



"The Court: Mr. Sutton, I have decided against inquiring into the religious affiliation of these jurors. I don't think that it's a proper inquiry to make. I don't think it has anything to do with their qualifications to sit as fair and impartial jurors. For that reason, I will not ask them to give us their religious affiliations, if any.

"I put that on the record, now, so your points—that your position is recorded. You do request that information?

"Mr. Sutton: Yes, I do, your Honor, because of the nature of the case."

Counsel concedes (Opening Brief, p. 10) that the questions to be asked the jury on voir dire are discretionary with the Court but urges that some religious groups take a more narrow view of obscenity than others. Yet, Appellants do not state which groups take which view. Certainly the exercise of the discretion of the Trial Court will not be disturbed in the absence of a clear showing of abuse in that discretion. *Brady v. United States*, 9 Cir. 1928, 26 F.2d 400, 403, cert. den. 278 U.S. 621; *Noland v. United States*, 9 Cir. 1926, 10 F.2d 768

In *Yarborough v. United States*, 4 Cir. 1956, 230 F.2d 56, cert. den. 351 U.S. 969, that Court stated, at page 63:

"Other contentions of appellant are so lacking in merit as to warrant only the briefest mention. He contends that the trial judge erred in not making inquiry of the jurors on the voir dire as to their religious affiliations. No matter of any religious significance whatever was involved in

the case; and appellant does not show how he could have been prejudiced in any way by the refusal of the judge to make inquiry of the jurors as to a private matter of this sort. There is nothing to show that he belonged to any religious sect or was charged with a crime as to which any sect held views different from the rest of mankind, and the jurors were interrogated fully as to all matters which might show interest or bias on their part or could affect their fitness to serve as jurors in the cause. It is well settled that what questions shall be asked of jurors on the voir dire is a matter resting in the sound discretion of the trial judge; and there is nothing here to show that the discretion was in any way abused."

In view of the foregoing, it is respectfully submitted that the Trial Court did not abuse its discretion in refusing to permit counsel to inquire, or to himself inquire, into the religious affiliations of the prospective jurors.

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**THE TRIAL COURT PROPERLY TOOK JUDICIAL NOTICE THAT UNITED AIR LINES IS A COMMON CARRIER AND ALTERNATIVELY, ANY ERROR COMMITTED DID NOT PREJUDICE THE APPELLANTS**

Appellants urge (Opening Brief, pp. 11-15) that there was prejudicial error committed by the Trial Court in judicially noticing that United Air Lines is a common carrier. Their argument appears to be that this was error because an element of the offense was involved. In this regard the Trial Court stated (T. 340):

"On the question of whether or not the Court, as requested by the Government, can judiciously notice that the United Airlines is a common carrier engaged in interstate commerce, as I indicated to counsel, I had little doubt the Court could judiciously notice this status, but I wasn't sure the Court could judiciously notice if it was an element of a crime. On further examination, I'm now satisfied that it can be judiciously noticed, although one of the elements of the offense charged in Count I was that a common carrier in interstate commerce was used for carriage of the motion picture film as charged. I found citations to the effect that Courts have in the past judiciously noticed that railway companies were engaged in interstate commerce. I would think that is close enough, so, I will judiciously notice that United Airlines is engaged in interstate commerce and is a common carrier, and will so advise the jury at the time I instruct them. However, I'm going to tell them, further, that there is evidence before them in addition to what the Court judiciously notices, of the fact that United Airlines is a common carrier engaged in interstate commerce."

In addition, however, to the judicial notice there was evidence before the jury that United Air Lines was covered by the C.A.B. Tariffs (Exhibit 9), the admission of which into evidence was in no way limited. Further, there was the testimony of Mr. Schuerman that the airlines service was available to the general public for consideration (T. 241) and that United Air Lines is a common carrier (T. 249).

In *Miller and Company of Birmingham v. Louisville & N.R. Co.*, 5 Cir. 1964, 328 F.2d 73, 78, cert. den. 377 U.S. 966, the Appellate Court took judicial notice of the fact that a railroad was a common carrier.

“Judicial notice will be taken of the existence and characteristics of established means of communication and transportation . . .” *Wharton’s Criminal Evidence*, Twelfth Edition, Volume 1, p. 126 (Judicial Notice § 58).

It is therefore urged that the Court properly took judicial notice of the fact that United Air Lines is a common carrier. Alternatively any error committed would not, it is submitted, be prejudicial to Appellants in view of the other evidence of the fact presented to the jury in the form of Exhibit 9 and the testimony of the witness Schuerman.

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**THE VERDICTS WERE ADEQUATELY SUPPORTED BY THE EVIDENCE AND THEREFORE THE TRIAL COURT PROPERLY DENIED THE SEVERAL MOTIONS FOR ACQUITTAL OR FOR A NEW TRIAL**

As to Appellant Gold, it is urged (Opening Brief, pp. 15-19) that his motions for acquittal or for a new trial should have been granted because of the fact (which Appellee admits) that the shipment of obscene film never left United Air Lines freight office in Las Vegas on its journey to New Jersey. Section 1462 of Title 18, United States Code, as enacted in 1948, proscribed the knowing *deposit* with any carrier

for carriage in interstate commerce of obscene matter. This section was amended in 1958 to read:

“Whoever . . . knowingly uses any . . . common carrier . . .”

for carriage in interstate commerce of obscene matter. The legislative history of the amendment indicates that it was the result of the decision in *Ross v. United States*, 10 Cir., 205 F.2d 619, wherein it was held that a violation of Section 1461 (dealing with the use of the mail) was complete upon the deposit in the mail of the obscene matter and therefore there was no venue to try the offense in the district of destination as would normally be permitted under the provisions of Title 18, United States Code, Section 3237.

The legislative history makes it abundantly clear that the purpose of the amendment was to make both Sections 1461 and 1462 continuing offenses thus overruling the effect of the *Ross* decision, *supra*, and giving rise to venue in the state or district of delivery. The legislative history is set forth in considerable detail in *United States v. Lueros*, D.C. Iowa, 1965, 243 F. Supp. 160, 176 and in *United States v. West Coast News*, D.C.W.D. Mich. 1962, 30 F.R.D. 13.

Nowhere does the legislative history indicate that Courts intended to destroy the common understanding and meaning of the word deposit as the same originally appeared in the statute

It is therefore Appellee's position that one who deposits an item for shipment with the carrier, pre-



pays the charges and thereby surrenders physical custody and dominion over the items being shipped does "use" and "cause to be used" the interstate carrier within the meaning of the statute as amended. The position of the Trial Court is set forth without ambiguity (T. 299):

"I take the position that the use of the words in the statute, 'knowingly, use of a common carrier for carriage,' means known use of a common carrier for purposes of transportation, to be transported, and I agree with Government counsel that the moment the shipment was tendered to the freight agent of United Airlines and the freight prepaid and a waybill made out and the Defendant Gold departed the scene that the language of the Statute, 'the knowing use of a common carrier for carriage,' that when Mr. Gold did these things that he knowingly used the common carrier for carriage in interstate commerce as those terms are used in Section 1462."

Although the writer has been unable to locate any reported decisions directly in point, Courts have held, for purposes of the Interstate Commerce Act, at least, that property is in interstate commerce from the time of its delivery to a carrier for shipment to another state. *United States v. So. Buffalo Ry. Co.*, D.C.N.Y. 1947, 69 F. Supp. 456, 459, affirmed 333 U.S. 771, 92 L. Ed. 1077, 68 S. Ct. 868.

Appellants urge (Opening Brief, pp. 20-21) that the several motions for acquittal should have been granted because the Trial Court committed error in



denying their motions to suppress the obscene film. The motion to suppress, they urge, should have been granted on the grounds that the shipment was seized as a result of an unlawful search and seizure.

In support of their position Appellants cite the dissenting opinion in *Marshall v. United States*, 9 Cir. 1965, 352 F.2d 1016. In that case the defendant had entrusted his landlady with a brief case with instructions to hold it for him and the landlady permitted agents of the Federal Bureau of Investigation to examine the contents of the brief case at their request. The majority of the Court in *Marshall*, supra, sustained the search. On September 29, 1966, however, in *Corngold v. United States*, Case No. 19,613, a majority of the judges of this Court overruled the *Marshall* decision. But in *Corngold*, supra, the officers participated in the examination of the shipment and it was apparent that the action of the airline representative was at the request of the agents. Additionally there was no search warrant involved in *Corngold*.

A different factual situation is presented by the present case from either the *Marshall* case or the *Corngold* case, for in the present case the agents merely informed the carrier that the information concerning the shipping document and labeling was believed to be false (T. 118, 189-190). The shipper was not informed of the suspected contents of the shipment as was the case in *Corngold* (T. 118, 190) and the carrier made an independent determination

to examine the shipment without any request or instruction from the agents (T. 105, 115). Further, the agents were not present when the carrier's representative, Mr. Dunne, and his supervisor examined the one carton of the shipment that was opened (T. 118, 119), also distinguishing the present case from the situation in *Marshall and Corngold*.

After Mr. Dunne had examined a portion of the contents of the opened carton, he felt that it "... should be someone else's business. I, therefore, notified the F.B.I." (T. 108.) In response to the notification the agents examined three of the rolls of film (T. 153) and the following morning seized the opened carton and the four unopened cartons pursuant to a search warrant (Exhibit 12), the validity of which is not challenged. In *Marshall and Corngold*, both *supra*, it does not appear that a search warrant was employed prior to the actual seizure.

Witness Dunne indicated (T. 109) that the next normally scheduled flight for the shipment in question would have been at 1:00 A.M. on November 4, 1965, but further indicated (T. 109) that it would depend on whether there was space available on the particular flight.

It is therefore Appellee's position that the opening of the package was ultimately accomplished by the carrier pursuant to its tariff and in no way for the purpose of satisfying the agents' interests in the shipment, nor was it a joint endeavor by the carrier and the agents.

Finally, Appellants Halbett and Fusco take the position (Opening Brief, pp. 21-24) that there was insufficient evidence to support their convictions under count II, the conspiracy charge. First, as to Appellant Fusco, it is stated (Opening Brief, p. 24) that he appeared at the United Air Lines counter in Newark, New Jersey, with a woman who did most of the talking, and that they had a shipping number on a piece of paper. Although it is apparent that the female, as is perhaps customary, did most of the talking, Appellant Fusco corrected her both as to the number of cartons in the shipment and as to the approximate weight of the shipment (T. 243, 244), thus indicating his personal knowledge and creating uncontroverted circumstantial evidence of his knowledge and participation in the alleged conspiracy.

As to Appellant Halbett, and again considering the evidence in the light most favorable to the Appellee (*Glasser v. United States*, 315 U.S. 60, 86 L. Ed. 680, 62 S. Ct. 457), the evidence shows that during the several days of surveillance conducted by the agents prior to the date of the shipment, no one, with the exception of a five or six year old female child (who entered the building on one occasion only) and an unidentified man (who was in the building for 17 minutes on November 2), entered or left the film laboratories which were under surveillance (T. 48-60). On November 3, Appellant Halbett was observed, along with Appellant Gold, loading the cartons into the Cadillac in which Gold was later observed at the

airport (T. 60). It is respectfully submitted that Appellant Halbett had to have knowledge of the conspiracy and contents of the shipment by reason of the foregoing circumstances and that this was sufficient evidence to justify his conviction.

The Trial Court's position on the question is set forth as follows (T. 347):

"I'm aware of that. Well, there is no need of belaboring the point. I feel there is sufficient evidence to take Mr. Halbett to the jury as to Count II. They could find, I think—and it would be supported—First of all, that there was a conspiracy; that he knew of it; that he joined it and wilfully participated in it with intent to advance some object of it, and that's all that's necessary."

It is obvious that being the only person associating with Appellant Gold at the film laboratory on a regular and consistent basis during the period of surveillance, Appellant Halbett had to have knowledge of the conspiracy, and having committed the overt act of loading the Cadillac, and further, being bound by the acts of the other conspirators, it is respectfully submitted that the evidence supports his conviction.

## V.

**CONCLUSION**

In view of the foregoing arguments and based upon the record herein, it is respectfully urged that there was no error committed by the Trial Court of a sufficient degree to require a reversal of the convictions of the Appellants and the same should therefore be affirmed.

Dated, Las Vegas, Nevada,  
October 18, 1966.

Respectfully submitted,

JOSEPH L. WARD,

United States Attorney,

ROBERT S. LINNELL,

Assistant United States Attorney,

*Attorneys for Appellee.*

---

**CERTIFICATE**

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT S. LINNELL,

Assistant United States Attorney,

*Attorney for Appellee.*





UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

\* \* \*

SAMUEL GOLD, HOWARD GUY	)	
HALBETT, and JOHN FRANK FUSCO,	)	
	)	
Appellants,	)	
	)	
-vs-	)	No. 21176
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
	)	

---

APPELLANTS' REPLY BRIEF

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FEB 15 1967

FILED

NOV 25 1966

WM. B. LUCK, CLERK



UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

\* \* \*

SAMUEL GOLD, HOWARD GUY )  
HALBETT, and JOHN FRANK FUSCO, )  
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Appellants, )  
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-vs- )  
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UNITED STATES OF AMERICA, )  
 )  
Appellee. )  
\_\_\_\_\_ )

No. 21176

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

\* \* \*

SAMUEL GOLD, HOWARD GUY	)	
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	)	
Appellants,	)	
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-vs-	)	No. 21176
	)	
UNITED STATES OF AMERICA,	)	
	)	
Appellee.	)	
	)	

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APPELLANTS' REPLY BRIEF

The Appellants, in reply to Appellee's Answering Brief, accept the Jurisdictional Statement, Statement of The Case, Specification of Error, and Summary, as set forth in Appellants' Opening Brief and Appellee's Answering Brief. The Appellants will reply to only those issues raised by Appellee's Answering Brief.

A R G U M E N T

I.

THE TRIAL COURT DID ERR IN TAKING JUDICIAL NOTICE THAT UNITED AIR LINES WAS A COMMON CARRIER

The Decision cited by Appellee, Miller and Company of Birmingham v. Louisville & N.R. Co., 328 F.2d 73 (5th Cir. 1964), for the Trial Court's authority to take judicial notice that United Air Lines was a common carrier, is not in



point. This case was a civil case, based on an indemnity agreement, and the Fifth Circuit Court took judicial notice that the railroad in question was a common carrier only because the Alabama Constitution so provided (page 78, footnote 2).

The Appellants' case is a criminal case, founded on a Federal Statute, which Statute requires proof that the Airlines was a common carrier, and occurred in a jurisdiction that does not provide by statute that an airline is a common carrier.

## II.

### THE TRIAL COURT DID ERR WHEN IT DENIED APPELLANTS' MOTIONS TO SUPPRESS THE OBSCENE FILM AS EVIDENCE.

Subsequent to filing Appellants' Opening Brief, this Circuit decided Corngold v. United States, No. 19.613, United States Court of Appeals for the Ninth Circuit, Sept. 29, 1966.

This Circuit, in Corngold, specifically overruled Marshall v. United States, 352 F.2d 1016 (9th Cir. 1965), which Decision was cited in Appellants' Opening Brief (page 20). The Appellee, in its Answering Brief, attempts to distinguish Corngold from this Appeal (pages 15-16). It is believed that Corngold is not distinguishable and that Corngold further supports the Appellants' position that





the Trial Court erred in denying Appellants' Motions to Suppress. The factual situation in this Appeal as in Corngold are similar.

United Air Lines Customer Service Manager Dunne testified, that but for the intervention of Special Agents Doyle and Murray, he would not have opened the carton, which, when opened, was found to contain obscene film. In Corngold, the TWA employee testified the package was opened because of the government agents request. Agents Doyle and Murray suggested to Dunne that the cartons Gold had delivered were mislabeled [R.T.190]. Customs Agents, in Corngold, also suggested the packages were mislabeled. The record in this Appeal, like the record in Corngold, does not show the packages were opened for any independent purpose by the carrier.

Nextly, Customer Service Manager Dunne, immediately after opening the carton, finding it contained film, notified the F.B.I., who then participated in the search of the cartons. The F.B.I. Agents, like the Customs Agents in Corngold, actively participated in the search of the cartons. The search, like the search in Corngold, was a joint operation.

The obscene film was discovered in the cartons



only after a search of the cartons, independent of the Appellants' consent. The same factual situation existed in Corngold, supra. The initial search of the carton was warrantless, without probable cause, not incident to Appellants arrest and an invasion of Appellants privacy.

The Appellants' case is even stronger than Corngold, for unlike the circumstances in Corngold, no immediate action on the part of the Agents was necessary to prevent the immediate removal of the cartons from the airport. The search by Dunne occurred at 3:50 o'clock P.M. and the shipment would not have left any earlier than 1:00 o'clock A.M. the next morning [R.T.102,109].

Further, unlike Corngold, where Customs Agents using a scintillator detected radioactivity in Corngold's car and established some cause to believe contraband was present in the car and checked into TWA, the Government Agents in the Appeal had observed cartons being placed in Gold's car, but did not follow the car to the airport, and further had no reasonable cause to believe the cartons contained obscene film.

The Appellants' conviction having resulted from an illegal search and seizure of obscene film, the conviction cannot stand. Ker v. State of California, 374 U.S. 23, 83 S.Ct. 1623, 10 L.Ed.2d 726 (1963); Wong Sun v.



(1963).

CONCLUSION

For the reasons and the authority set forth in Appellants' Opening and Reply Briefs the Appellants' convictions should be set aside.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in fully compliance with those rules.

RAYMOND E. SUTTON

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RAYMOND E. SUTTON





**No. 21180** ✓

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

1966 TERM

C. H. LEAVELL & COMPANY, a  
Texas corporation, and RIVER CON-  
STRUCTION CORPORATION, a  
Delaware corporation, a Joint Venture,  
and ALLISON STEEL MANUFACTUR-  
ING CO., an Arizona corporation,  
Appellants,

vs.

FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation,  
Appellee.

Appeal from the  
United States  
District Court for  
the District of  
Arizona

BRIEF OF APPELLANTS, C. H. LEAVELL & COMPANY,  
RIVER CONSTRUCTION CORPORATION AND  
ALLISON STEEL MANUFACTURING CO.

MARK WILMER  
SNELL & WILMER  
Attorneys for Appellants

**FILED**

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## ABBREVIATIONS

Fireman's Fund (Fireman's Fund Insurance Company)

Allison (Allison Steel Manufacturing Co.)

El Paso (El Paso Natural Gas Company)

Leavell (C. H. Leavell & Company)

T.R. (Transcript of the Record)

Ex. (Exhibit)





**No. 21180**

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

1966 TERM

C. H. LEAVELL & COMPANY, a  
Texas corporation, and RIVER CON-  
STRUCTION CORPORATION, a  
Delaware corporation, a Joint Venture,  
and ALLISON STEEL MANUFACTUR-  
ING CO., an Arizona corporation,  
Appellants,

vs.

FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation,  
Appellee.

Appeal from the  
United States  
District Court for  
the District of  
Arizona

BRIEF OF APPELLANTS, C. H. LEAVELL & COMPANY,  
RIVER CONSTRUCTION CORPORATION AND  
ALLISON STEEL MANUFACTURING CO.

**JURISDICTION**

**(a) THE DISTRICT COURT**

Plaintiff C. H. Leavell & Company is a Texas corporation with its principal place of business in El Paso, Texas. River Construction Corporation is a Delaware corporation with its principal place of business in Fort Worth, Texas. Allison Steel Manufacturing Co. is an Arizona corporation with its prin-

principal place of business in Phoenix, Arizona. Defendant Fireman's Fund Insurance Company is a California corporation authorized to engage in business and engaging in business in Arizona with its principal place of business in San Francisco, California.

The amount in controversy is in the principal sum of \$85,403.00 exclusive of interest and costs.

The jurisdiction of the District Court is therefore conferred by Section 1332, Title 28 U.S.C.

(b) THIS COURT

Written final judgment denying any recovery to plaintiffs was signed by the Court and filed and entered by the Clerk June 8, 1966. (T.R. 43, 53).

Notice of Appeal to this Court (T.R. 44), Bond on Appeal (T.R. 45, 46), Designation of Contents of Record on Appeal (T.R. 47, 48) and Concise Statement of Points to be Relied Upon by Plaintiffs on Appeal (T.R. 49, 50), were all filed by appellants with the Clerk of the District Court June 15, 1966, and the Clerk, after one Order by the District Judge Extending Time, timely lodged the record (including copies of the Transcript of the Record) in this Court on or about July 29, 1966.

The jurisdiction of this Court is therefore conferred by Section 1291, Title 28, U.S.C.

### STATEMENT OF THE CASE

The cause, as to the issue of the liability of defendant, Fireman's Fund Insurance Company (hereinafter, "Fireman's Fund") to plaintiffs, C. H. Leavell & Company, River Construction Corporation and Allison Steel Manufacturing Co. (hereinafter, "Allison"), under its policy of insurance was, by stipulation of the parties and court order on pretrial, severed and tried separately from trial of the issue as to the amount of loss suffered

by Allison. (T.R. 52). By agreement of the parties (T.R. 52, 53) the cause was submitted for decision upon an "Agreed Statement of Facts" (T.R. 23-29), including a copy of the insurance policy involved (T.R. 7-14), certain plans and specifications for the bridge structure involved (Ex. 1 in Evid.), certain erection procedures, plans and drawings and certain photographs. Since there is no dispute as to the facts further transcript references will be omitted as unnecessary.

El Paso Natural Gas Company (hereinafter, "El Paso"), required a pipe line bridge over the Flaming Gorge Reservoir in Wyoming near Dutch John, in Utah. As appears from the photographs, Exhibits 3 through 7 in Evidence, this was a large engineering undertaking involving large steel structures and heavy cables with related fastenings, braces, booms and structures for the purpose of supporting a large natural gas main across this gorge and reservoir.

El Paso issued an "Invitation to Bid," which invitation included detailed plans and specifications for the pipeline suspension bridge structure (Ex. 1 in Evid.). C. H. Leavell & Company and River Construction Corporation (hereinafter, "Leavell") as a joint venture was the successful bidder and was awarded the contract by El Paso.

Leavell entered into a subcontract with Allison Steel Manufacturing Co. (hereinafter, "Allison Steel") under which Allison Steel was to supply the bridge structure material and fabricate, construct and physically erect the structure. Leavell undertook to and did provide insurance written by Fireman's Fund for the account not only of Leavell and River Construction Corporation, a joint venture, as prime contractor but also "The Account of their Subcontractors."

Prior to the acceptance of this risk by Fireman's Fund and the issuance and delivery by it of the aforesaid policy of insurance, Fireman's Fund had received El Paso's "Invitation to Bid", Plans and Specifications for examination and presumptively an

engineering or other evaluation of these plans and specifications to determine the extent and nature of hazard involved.

Thereafter a policy of insurance was delivered to Leavell written and designated by Fireman's Fund as a "Bridge Builders 'All Risk' Form" ("Exhibit A" to Allison's Complaint, T.R. 7-14) insuring Allison (all parties plaintiff, Allison as a subcontractor but not specifically insured by name)" \* \* as to the property; described and located as follows:

"Single Span Suspension Pipeline Bridge to be located over the Flaming Gorge Reservoir Approximately 12 miles North West of Dutch John, Utah in the State of Wyoming."

Allison Steel engineered and drafted what it termed "erection procedures" which spelled out the various mechanical steps and procedures which it proposed to employ in actually erecting the bridge structure in performance of its subcontract. These shop drawings and related papers were submitted to Leavell and El Paso for review and approval, but they were not submitted to Fireman's Fund *or examined or considered by Fireman's Fund in accepting the risk and issuing its policy of insurance.* (Finding of Fact 5, T.R. 24). (Emphasis added)

The plans and specifications for said bridge called for the erection of a high, generally "H" shaped steel tower on each side of the Flaming Gorge Reservoir supporting a set of 6 "main" pipeline cables anchored to the ground substantially back from the base of each tower. These cables extended from this anchor base to the top of the tower and were to be strung from over the top of the tower extending across the reservoir and gorge to the top of the opposite tower and then in turn brought back to earth and anchored in the ground substantially back from the tower. These cables were 2¼" in diameter and served to support the pipeline across the Flaming Gorge Reservoir as it was suspended by suitable attachments from and below these main or pipeline cables.

A second set of cables was also called for by El Paso's plans

and specifications known as "wind boom" cables. These cables, two in number, served the primary purpose of stabilizing the bridge structure and pipeline against the force of the wind. The end or base of a boom (a long round timber or pole) was to be attached on the side of each tower at approximately one third of the height of the tower from the ground in such manner that it could be raised vertically parallel to and along the side of the tower and thereafter the boom with its base so attached to the tower could be lowered outward so that it extended outward from the tower approximately parallel to the ground and at right angles to the direction of the pipeline cables. As first attached to the tower, the boom was in a raised position substantially parallel to the vertical side of the tower. In this position the wind boom cables were to be attached to the top end of the boom, and after the wind boom cable was attached to its top or outer end, the boom would be lowered so that the boom itself would be substantially horizontal, and the wind boom cable as attached or fastened to the outer end of the lowered boom would parallel the pipeline cables and extend across the reservoir and be anchored to the ground in like fashion to the main or pipeline cables. These wind boom cables were  $2\frac{3}{4}$ " in diameter and substantially heavier than the main pipeline cables.

The method by which Allison Steel proposed to physically position the cables involved was for each main pipeline cable to be first strung across the top of a sheave cluster on the top of each bridge tower and over the reservoir, and then properly anchored on each side of the reservoir beyond the base of each tower in the ground. Following this it was then necessary to lift each main cable from its temporary resting place on top of the sheave cluster and "drift" or move it to its permanent resting place in one of the grooves in the sheave on top of the tower. A sheave is a wheel-like device designed, in this case, to support a main cable but allowing for some movement of the cable due to expansion and contraction of the metal.



The wind boom cables were also to be first stretched or strung across the gorge, and anchored at each end in the ground in the same fashion as the main cables and preliminarily held aloft above the gorge and reservoir by supports affixed to the side of the tower at approximately opposite the end of the boom in its raised position. As raised, the booms extended from the end as attached to the tower about one third of the over-all height of the tower from the ground to about one fourth of the height of the tower from its top. After being so anchored and strung across the gorge and reservoir, they were to be lifted and positioned attached to the end of the wind boom which would then be lowered so that it extended directly outward from its base as attached to the side of the tower to its final stabilizing position, approximately parallel to the ground.

It was necessary for Allison Steel to devise a means for lifting each cable and moving it to its permanent position in the structure. (Just as it had to devise procedures for lifting the booms in place, lifting the steel for the tower in place, and all the other things having to do with the *mechanics of erection and construction* as distinguished from the *general design or method of construction*). To accomplish this mechanical movement and positioning in the bridge structure of these main pipeline cables, a form of derrick was designed and constructed by Allison Steel in its plant in Phoenix from which derrick a block and tackle was to be suspended to lift and drift each pipeline cable into its permanent place.

This derrick consisted of a steel beam with the bottom end so constructed that it could be bolted upright to the top of the tower at the corner of the tower, in appearance, in place, like an upward extension of the steel beam constituting that side of the tower. At the other or top end of this beam, a piece of steel was welded at right angles to the beam giving the derrick, in place, the appearance of an inverted "L". At the end of this steel piece which was so welded to the steel beam, there was a hole



so that a block and tackle could be fastened to this end and employed to lift and move each main pipeline cable as it was stretched on the top of the tower across the gorge and below this derrick head, into its permanent position in the bridge structure. These derricks were only temporarily attached to the tower and were to be detached and removed after serving their purpose in moving and placing the main pipeline cables.

The erection procedure instructions in connection with positioning the wind boom cables did not call for use of a derrick to suspend the block and tackle above the cables but called for the wind boom cables to be lifted and positioned through the use of a block and tackle attached to the top corner of the tower above the wind boom cables.

Allison Steel's workmen, after positioning the main pipeline cables through use of these derricks, then attempted to use the block and tackle fastened to one of these derricks to also position the wind boom cables on the booms. The workmen first started to position the wind boom cables on the downstream side of the tower by using the block and tackle on the derrick on that side. After this procedure was commenced, workmen on that tower noticed that this derrick was starting to twist. The operation was halted and guy lines were attached to the derrick. Thereafter, the positioning of the downstream wind boom cable was completed without incident. The workmen then attached guy lines to the derrick on the upstream side of the tower and attempted to use the block and tackle attached to that derrick to move the wind boom cable on the upstream side onto its wind boom. Due mainly to the fact that there was a defective weld fastening the steel plate to the steel beam leg of the derrick (being the steel plate to which the block and tackle were attached) but also in all probability to the fact that the derrick was not designed for the heavier load of the larger wind boom cables or the strain due to the greater angle of pull against the steel plate, the weld gave way and the wind boom cable fell to the ground, shearing off the upstream wind booms from the

towers and causing other extensive damage to the towers and the cable itself.

Why the workmen attempted to use the block and tackle attached to the derrick and did not follow the procedures indicated in these shop drawings and use a block and tackle attached to the tower itself in attempting to lift and position this wind boom cable was not established. The Court found that either these workmen had not reviewed the erection procedures specified in the drawings or "took a chance" thereby avoiding the extra work required in going to the top of the tower, disengaging the block and tackle from the top of the derrick and re-attaching it to the corner of the tower at the top of the tower.

The following photographs were marked as exhibits:

*Exhibit 3*—This is a view of the tower where the failure occurred. The photograph was taken prior to the start of cable transporting, the cables in the photograph being temporary guy lines. The derricks are depicted on the top of the tower. The wind booms and wind boom platforms are depicted on the sides of the tower. The red arrow points to the place where the derrick in question failed.

*Exhibit 4*—This photo was taken from the top of the tower looking from the center to the edge of the tower, showing the derrick fastened in place to the top of the tower and depicting the base of the derrick, the lower portion of the main part of the derrick, and the lower portion of the lateral stabilizing member of the derrick.

*Exhibit 5*—This photograph of the tower was taken after the failure had occurred. It is taken from the north looking south and thus is taken from the same direction as Exhibit 3. The drawing which has been made on this exhibit illustrates the manner in which the wind boom cable was being moved at the time the derrick failed. The arrow at the top of the photo

points to the derrick which failed. Point number 1 on the photo is the place from which the cable was to be moved after having been transported across the gorge. Point number 2 illustrates the position of the end of the wind boom to which the cable was being moved when the failure occurred. Point number 3 on the photo depicts the position of the lateral pulling force being used to move the cable laterally at the time of the failure. The dotted line between the arrow and point number 2 depicts the approximate position of the block and tackle being used to provide the vertical lift for the wind boom cable at the time the derrick failed.

*Exhibit 6*—This photograph depicts the lateral arm of the derrick which broke off the vertical arm of the derrick at the time of failure of the weld.

*Exhibit 7*—This photograph depicts the derrick on the downstream side of the tower showing the damage which occurred to the derrick while the wind boom cable on the downstream side was being positioned.

Allison by its Complaint (as amended) in substance alleged the foregoing fact situation and sought recovery under the policy of insurance from Fireman's Fund in the principal sum of \$89,403.00.

Fireman's Fund by its Amended Answer (disregarding formal admissions and denials), in substance asserted two defenses as follows:

(a) "In this regard, defendant alleges that said loss and damage was caused by error, omission or deficiency in design, specifications or materials, or by a material alteration or change during the policy term in general design or method of construction." (T.R. 21).

(b) ". . . plaintiffs recovery is further precluded by the fact that the general design or method of construction was materially altered or changed during the policy term." (T.R. 21, 22).

The Court found that Fireman's Fund relied upon the following provisions as excusing it from liability under the facts of the case. (Court's Conclusion of Law, T.R. 38).

"The pertinent exceptions and exclusions of the insurance policy which the defendant asserts apply to the facts of this case are as follows:

'This policy shall also cover, but only while situated at the site of operations described herein:

(a) materials, equipment and supplies intended to become part of such property and

(b) falsework, temporary trestles and similar structures.

This policy shall NOT cover tools and contractors' equipment.

3. THIS POLICY DOES NOT INSURE LOSS, DAMAGE OR EXPENSE CAUSED BY OR RESULTING FROM:

(g) Error, omission or deficiency in design, specifications or materials unless fire or explosion ensues and then only for the loss, damage or expense resulting from such fire or explosion;

4. This policy shall be void unless otherwise provided by agreement in writing added hereto, if:

(a) The general design or method of construction be materially altered or changed during the policy term;'"

The Court found that the use by Allison Steel's employees of the block and tackle attached to the derrick which was designed to lift and position the "main pipeline cables", in attempting to lift and position the "wind boom cables" with the resulting failure of the derrick to Allison's damage "constituted a material alteration or change in the method of construction" which voided the policy and excused Fireman's Fund from all responsibility for the consequent damage to the bridge structure. (T.R. 41,42). Judgment was entered accordingly denying Allison any recovery. (T.R. 43). Hence this appeal.

## SPECIFICATION OF ERRORS RELIED UPON

## I.

The District Judge erred in concluding that the use by Allison's employees of the block and tackle attached to the "main pipeline cable" derrick to lift and position the "wind boom cables" as a result of which misuse the derrick failed causing the damage complained of "constituted a material alteration or change in the method of construction" of the bridge structure which defeated Allison's right to reimbursement for its losses for the reason that the policy provision voiding coverage in the event of a material alteration or change in general design or method of construction had reference only to the general design or method of construction as set forth in El Paso's Plans and Specifications and (contrary to the Court's conclusion) had no reference whatever to the working drawings agreed to between Leavell and Allison Steel as its subcontractor.

## II.

The District Judge erred in reaching the conclusion set forth in Paragraph I, *supra*, for the reason that the erection procedures devised and engineered by Allison Steel for review and approval by Leavell as prime contractor and for its pre-planned guidance in erecting the structure in advance of actual construction constituted no more than proposed or pre-planned engineering solutions to various mechanical problems which would be encountered by Allison Steel in physically lifting and moving heavy objects in the course of actually constructing the bridge in accordance with "the general design or method of construction" set forth in El Paso's plans and specifications.

## III.

The District Judge erred in reaching the conclusion set forth in Paragraph I, *supra*, for the reason that Fireman's Fund in issuing its policy of "All Risk" insurance contracted with Leavell and Leavell's subcontractors with reference to and based upon



the "general design *or* construction method" as set forth and spelled out in the plans and specifications accompanying El Paso's "Invitation to Bid" and not with reference to or based upon the so-called construction procedures for use in day by day construction work in building the structures as developed by Allison for its own guidance and the approval of the prime contractor. Hence any deviation from these working drawings was (a) in the discretion of Allison Steel, if approved by Leavell and (b) in any event was not such a change or alteration as was within the contemplation of the contracting parties when the insurance policy was written and so not such an "alteration" as would fall within the language of the contract exclusionary clause.

#### IV.

The Court erred in entering judgment that Allison "take nothing by their complaint" and that defendant have judgment against Allison since such judgment was based upon the Court's erroneous conclusions above set forth.

#### ARGUMENT

The District Judge, in concluding that the unauthorized and unanticipated use, by Allison Steel's employees, of a block and tackle attached to the main pipeline cable derrick to lift and position the wind boom cables relieved Fireman's Fund for the loss arising from this failure to re-position the block and tackle to the tower itself reasoned as follows:

"To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy. There are many negligent acts that one may conjecture this policy was intended to cover: loss that resulted from workmen rushing or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc.

"In this case, the workmen's acts are imputed to the employer, and, therefore, the employer is bound by the intentional deviation from the designated construction plans that occurred



here. The employees either disregarded the plans or were ignorant of them. In either case, the contractor was at fault for either not informing its workers of the plans, or in failing to supervise their conduct.

"The fact that the plans were not approved by the insurance company, prior to the issuance of the policy, is immaterial here since the company had a right to rely on the method of construction to be submitted in accordance with sound engineering principles. In fact, it could be said that, not having seen these plans, or having written them, the defendant is not bound by the usual rule applicable to insurance policies, namely: that the language of a policy is construed most strongly against the insurance company issuing the policy. Certainly the method of construction to be followed in the building of the bridge was incorporated by reference in the policy and was, therefore, an integral part thereof."

It is seen from the foregoing that the District Judge failed to properly analyze the Contract of Insurance, failed to perceive and give effect to its purpose and, finally, read the policy of insurance as if written upon the application of Allison Steel as the prime contractor rather than upon application of C. H. Leavell & Company and River Construction Corporation a joint venture engaging as prime contractor to perform a contract with El Paso Natural Gas Company. The fact that Allison Steel was, at least in practical effect, the sole subcontractor and hence in effect had stepped into the prime contractor's shoes does not in any fashion either enlarge or limit the terms of the policy of insurance written by Fireman's Fund based upon the "Invitation to Bid" and related documents issued by El Paso.

First off, there is nothing in the policy language which requires that the loss insured against be brought about by "accident" in the sense that someone was negligent thereby causing the loss or which indicates that its object was to protect the insured against only "negligent acts that . . . this policy was intended to cover: loss that resulted from workmen rushing

or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc."

Secondly, the question as to whether or not "the contractor was (or was not) at fault for either not informing its workers of the plans or in failing to supervise their conduct" is wholly irrelevant to a proper analysis and construction of this policy of insurance and a determination if this loss is covered thereby. It is no more material than would be the question of the negligence or lack of negligence of a motorist who seeks reimbursement from his collision loss insurance carrier for damage to his car resulting from an accident in which the motorist was involved.

This is a policy of insurance whereby the insurance company engages to make whole the contractor and its subcontractor for loss and damage to the property described while in the course of construction subject to certain exclusions mainly related to property other than that a part of, or intended as an integral part of, the actual structure insured.

That this is without question appears from an examination of the policy of insurance ("Exhibit A" to the Complaint):

"In consideration of the stipulations herein named and of

Three Thousand Five Hundred Forty Five and No/100th dollars premium THE FIREMAN'S FUND INSURANCE COMPANY, hereinafter called the Company does insure C. H. LEAVELL & CO. & RIVER CONSTRUCTION CORPORATION A JOINT VENTURE, FOR THEIR ACCOUNT AND OR THE ACCOUNT OF THEIR SUBCONTRACTORS, hereinafter called the Assured whose address is 1900 Wyoming Ave., El Paso, Texas for account of C. H. LEAVELL & COMPANY & RIVER CONSTRUCTION CORPORATION A JOINT VENTURE, FOR THEIR ACCOUNT AND OR THE ACCOUNT OF THEIR SUBCONTRACTORS loss, if any, payable to The Assured or Order for the term of Six Months from the 9th day of March, 1962, at noon, standard time, at location of property described herein

to the 9th day of September, 1962, at noon, standard time, at location of property described herein, for not exceeding \$767,206.00 par of \$767,206.00 being 100% interest on property including foundations, additions, attachments and permanent fixtures belonging to and constituting a part of said property hereinafter referred to as the property; described and located as follows:

Single Span Suspension Pipeline Bridge to be located over the Flaming Gorge Reservoir Approximately 12 miles North West of Dutch John, Utah in the State of Wyoming.

This policy shall also cover, but only while situated at the site of operations described herein:

- (a) materials, equipment and supplies intended to become part of such property and
- (b) falsework, temporary trestles and similar structures.

This policy shall NOT cover tools and contractors' equipment.

1. It is a condition of this insurance that this policy covers the property described herein only while the afore-described property is in process of construction and until completed or until the expiration of this policy, whichever may first occur.

2. **THIS POLICY INSURES AGAINST:**

All risks of direct physical loss of or damage to the property covered, except as provided elsewhere in this policy."

There follows an enumeration of losses not insured against:

1. Strikes, riots, vandalism, etc. clause;
2. War clause;
3. Governmental action clause;
4. Failure of insured to preserve the property after damage;
5. Delays;
6. Wear and tear and gradual deterioration, expansion and contraction unless causing collapse;
7. Error, omission or deficiency in design, specifications or materials unless fire or explosion results therefrom;
8. Nuclear reaction, etc. clause.

The policy then provides it shall be void under certain conditions:

- "4. This policy shall be void unless otherwise provided by agreement in writing added hereto if:
  - (a) The general design or method of construction be materially altered or changed during the policy term; or
  - (b) Any change takes place in the interest, title or possession of the subject of insurance; or
  - (c) This policy be assigned or transferred.
- "5. This policy shall be void if the Assured has concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof or in case of any fraud, attempted fraud or false swearing by the Assured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

A further detailed review of the policy can serve no useful purpose. Suffice it to say that nowhere in the policy is there even a hint that the negligence or lack of negligence of the insured is material to a determination of the compensability or non-compensability of any loss or damage to the property; nowhere is there any language which even squints at a duty on the part of the insured to properly supervise and instruct its employees.

Certainly, in reading into the policy of insurance written by Fireman's Fund based upon its examination of the plans and specifications for the bridge structure as drawn and written by El Paso Natural Gas Company, procedures agreed to between the prime contractor and its subcontractor spelling out how the subcontractor prepared to discharge its subcontract obligation to the prime contractor, the Court wanders far afield from the contractual agreement actually entered into between Leavell, a joint venture, as prime contractor and Fireman's Fund as insurer of the property rights in the structure to be built.

The "general design and method of construction" was that spelled out in El Paso's plans and specifications. These were the

plans and specifications within the contemplation of the contracting parties; these supplied Fireman's Fund's engineers with the basic detail for an evaluation as to the basic soundness of the structure to be insured and therefore the risk assumed by Fireman's Fund.

The general design or (general) method of construction can, in reason, only refer to the general design or method of construction as set forth in El Paso's plans and specifications. To conclude that a deviation from a plan of procedure outlining how a subcontractor would go about fabricating and erecting the bridge structure which plan was agreed to only between the subcontractor Allison Steel and the prime contractor Leavell (which plan of procedure was never seen or considered by Fireman's Fund) constitute a material alteration or change in the general design and method of construction, appellant respectfully asserts, simply flies in the face of reason. It disregards entirely accepted rules of construction.

If it can be concluded that it is unclear what "method of construction" was within the contemplation of the parties when the policy was issued and that a mechanical procedure for lifting and moving a cable can be stretched to mean a "method of construction," then it is clear that the documents, circumstances and purpose of the parties, as gathered from proof extrinsic the insurance contract may be looked to for guidance.

"In such case the real contract is to be determined from the terms and conditions placed in the contract, considered in the light of the object and purpose of the parties, that is, in the light of the language used, the situation of the parties and the subject matter of the contract. Conversations between the parties had at the time the insurance was effected may be competent."

1 Couch on Insurance 2d §15:57 (1959) and cases cited;



44 C.J.S. *Insurance* §291 (1966);

*Employers Liability Assur. Corp. v. Wasson*, 75 F.2d 749, 753 (C.A. 8, 1935);

*Paddleford v. Fidelity and Casualty Co. of N. Y.*, 100 F.2d 606, 611 (C.A. 7, 1939), cert. den. 306 U.S. 664.

In *Reed v. The Merchants Mutual Insurance Company*, 95 U.S. 23, 30, 24 L.Ed 348, 349 (1877) the Supreme Court, in considering the proper interpretation to put upon an insurance provision defining the risk involved said:

"This case, upon the merits, depends solely upon the construction to be given to the clause in the policy before referred to, namely: 'the risk to be suspended while vessel is at Baker's Island loading;' and turns upon the point whether the clause means, while the vessel is at Baker's Island for the purpose of loading, or while it is at said Island actually loading. If it means the former, the Company is not liable; if the latter, it is liable. . . . Although a written agreement cannot be varied (by addition or subtraction) by proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the standpoint of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as indispensable as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent falling into mistakes and *even absurdities*." (Emphasis supplied).

We respectfully suggest that the District Judge, by failing to read the insurance contract in the light of the contract documents considered by both the joint venture, Leavell, the applicant for the insurance, and Fireman's Fund, the insurer, as evidencing and stating the risk insured, has fallen into error which approaches in degree the harsh appellation of an absurdity.

Likewise the meaning and intent of an insurance contract is to be determined and construed as of the time it is effective.



1 Couch on Insurance 2d §15:10 n. 17 (1959).

The Court not only laid aside all consideration of what the parties had in view as the risk insured—that arising from the construction of the bridge in question as judged from the plans and specifications issued by El Paso—but also relied upon reasons for denying coverage which find no support, even remotely, in the language of the policy.

The District Judge said:

"To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy. There are many negligent acts that one may conjecture this policy was intended to cover: loss that resulted from workmen rushing or hurrying to complete the job, slipping or falling while working, a minor alteration in the method of construction, etc.

"In this case, the workmen's acts are imputed to the employer, and, therefore, the employer is bound by the intentional deviation from the designated construction plans that occurred here. The employees either disregarded the plans or were ignorant of them. In either case, *the contractor was at fault for either not informing its workers of the plans, or in failing to supervise their conduct.*" (Emphasis added).

The Court further reasoned:

"The fact that the plans were not approved by the insurance company, prior to the issuance of the policy, is immaterial here since the company had a right to rely on the method of construction to be submitted in accordance with sound engineering principles. In fact, it could be said that, not having seen these plans, or having written them, the defendant is not bound by the usual rule applicable to insurance policies, namely: that the language of a policy is construed most strongly against the insurance company issuing the policy. Certainly the method of construction to be followed in the building of the bridge was incorporated by reference in the policy and was, therefore, an integral part thereof."

The foregoing reasoning coupled with the Court's conclusion that Allison Steel lost the policy protection through "failing to supervise their (employees) conduct" simply wrote all hazard to Fireman's Fund out of the policy. If adherence to "sound engineering principles" plus effective supervision of all employees is required of Allison Steel to keep the policy in effect, Allison Steel (and Leavell) became in practical effect a self-insurer.

The Court's conclusion that somehow the insurance company's position is advantaged by the fact it did not write and never saw the working plans and procedures and therefore the language of the policy in respect thereto is not "construed most strongly against the insurance company issuing the policy" is neither good law nor good logic.

So also the Court's conclusion that these working procedures which, for all the record shows, were not even in existence when the policy was written, and which were, in any event, not even known to or seen by Fireman's Fund were "incorporated by reference in the policy and was (were) therefore an integral part thereof" must be rejected as wholly without support in contract or insurance law and quite at war with reason and logic.

Fireman's Fund was concerned with the over-all soundness of the plan and structure—it was not concerned with the detail of *how* the job was to be done. If it had been concerned with the day to day work and how it was to be accomplished, it would have reviewed the working drawings which Allison Steel prepared for Leavell's approval prior to writing the policy of insurance involved.

Certainly Fireman's Fund should have put its insureds upon notice of the importance it attached to the working procedures prepared for Leavell's approval and made it plain to Allison Steel and Leavell that any deviation from these procedures as agreed to between Leavell and Allison Steel would be fatal to the insurance coverage afforded by the policy if this was in fact its

intent. Certainly when Fireman's Fund limited its review of the design and method of construction of the bridge structure to the plans and specifications prepared by El Paso and wrote and issued its policy of insurance in reference to those plans and specifications, it may not now, after loss sustained, enlarge or add to the "blue print" which all parties had in mind when the policy was written.

The derrick herein involved *is no more than a contractor's tool used in doing the job at hand*. Likewise the block and tackle intended for use on the wind boom cables was a contractor's tool also to be used in doing the job. In principle this derrick and the block and tackle are in the same category as contractors' wrenches, hammers, saws and the many other items of equipment utilized in performing a construction contract.

Indeed, the District Judge concluded that the derrick was a piece of contractors' equipment. So also was the block and tackle. Would it be reasonable to conclude that because a workman used a wrench with a four-foot long handle rather than one with a one-foot handle as the procedures may have indicated thereby twisting the nut to be tightened off rather than just tightening it that the general method of construction was thereby changed?

The method of construction here involved was to string the cables across the gorge, fasten them at each end and position them in their appropriate places in the bridge structure. These cables were to be lifted as indicated to the side of the bridge tower and moved from this resting place and fastened to the raised end of the wind boom. *How* this was to be done was a problem within the special know-how and engineering experience of the contractor. Whether to employ for this purpose a block and tackle, a derrick or a hundred Chinese Coolies pulling upon a rope was for the contractor to decide.

No case has been found in point, insofar as this particular policy exclusion language is involved. General principles of con-

struction as applied to insurance contracts are so well known there is no point in lengthening this brief with a re-run of the cases.

The policy, by definition of Fireman's Fund, is an "all risks" bridge builders policy. The annotator of the subject "Coverage Under 'All Risks' Insurance," Annot., 88 A.L.R.2d 1122, 1125 (1963) states in summary:

Such a policy is to be considered as creating a special type of coverage extending to risks *not usually covered under other insurance*, and recovery under an 'all risk' policy will be allowed for all *fortuitous losses* not resulting from misconduct or fraud, unless the policy contains a specific provision expressly excluding the loss from coverage. The insured will not be entitled to recover where the loss was not due to any fortuitous event, or where it resulted from the fraud, or possibly some lesser degree of misconduct of the insured." (Emphasis supplied).

In *General American Transportation Corp. v. Sun Insurance Office Ltd.*, 239 F.Supp. 844, 845-846 (E.D. Tenn. 1965), the Court held that the risk of negligence by the plaintiff's employees was a risk covered under a policy insuring plaintiffs "'\* \* \* all risks of physical loss or damage \* \* \* from any cause \* \* \* except \* \* \* . . . ' \* \* \* (1) loss or damage due to delay, loss of use, \* \* \* or other consequential loss extending beyond the direct physical loss or damage to the insured property. \* \* \*'" This exclusion concerning "latent defect" is analogous to defendant's interpretation of Section 3(g)'s "deficiency in design, specifications and materials" language.

The Court stated:

"The first question for adjudication, therefore, is whether the casualty was covered by the insurance contract of the parties.

"The Court finds that the damages sustained by the plaintiff resulted from a combination or occurrence of proximate causes, including at least the negligent welding by the plaintiff's workmen in prefabrication of the highly-stressed top

flange of the insert at a truss, designated as truss #3, which apparently failed and permitted an increased deflection of that truss, which in turn resulted in local or general buckling of the bottom chord involved and a transfer of the resulting overloading to adjacent trusses; that, thereupon, the entire false-work system failed almost simultaneously. It would be redundant to undertake to fix any further cause of loss, because '\* \* \* where a policy expressly insures against direct loss and damage by one element, but excludes loss or damage caused by another element, the coverage extends to the loss even though the excluded element is a contributory cause. \* \* \* *Fireman's Fund Ins. Co. of San Francisco v. Hanley*, C.A. 6th (1958) 252 F.2d 780, 783, 785 [1], citing *Pearl Assurance Company, Ltd. v. Stacey Brothers Gas Const. Co.*, C. A. 6th (1940), 114 F.2d 702, 705 [5]. *Any such negligence of the plaintiff's workmen in making the prefabrication welds constituted a fortuitous and extraneous event and was not a necessary or normal consequence of the work. ' \* \* The risk of negligence does not come within any exception to the policy and therefore it is an insured peril. \* \* '* *Associated Engineers, Inc. v. American National Fire Ins. Co.*, D.C.Cal. (1959), 175 F.Supp. 352 [1], citing *Central Manufacturers' Mutual Ins. Co. v. Elliott*, C.A. 10th (1949), 177 F.2d 1011; *Fed. Ins. Co. v. Tamiami Trails Tours*, C.A. 5th (1941), 117 F.2d 794; *New York New Haven & Hartford R.R.Co. v. Gray*, C.A. 2d (1957) 240 F.2d 460." (Emphasis supplied).

See also generally:

*Kraftsow v. Brown*, 94 A.2d 183 (Pa.Super. 1953);

*Glassner v. Detriot Fire and Marine Ins. Co.*,

23 Wis.2d 532, 127 N.W.2d 761, 764 (1964);

*Sincoff v. Liberty Mutual Fire Insurance Co.*,

11 N.Y.2d 386, 230 N.Y.S.2d 13, 183 N.E.2d 899 (1962);

*Jewelers Mutual Ins. Co. v. Balogh*, 272 F.2d 889 (C.A. 5, 1959);

*Associated Engineers, Inc. v. American Nat. Fire Ins. Co.*, 175 F.Supp. 352 (D.C.N.D.Cal. S.D. 1959).

In the last cited case, the District Judge well characterized this type of policy as follows:



"Defendant does not seriously dispute plaintiff's explanation of how the loss was caused but contends that 'poor workmanship' is not a peril covered by the policy. According to its terms the policy provides coverage on all property 'against all risks of physical loss or damage from any cause howsoever and wheresoever occurring' until the work has been completed and accepted. An explicit exception to the above coverage is 'loss or damage caused by wear, tear, gradual deterioration and or inherent vice.' *This type of policy is generally referred to as All-Risk insurance and it is unlike other types in that it does not specify the events which must cause loss or damage before the insurer is liable; it is a promise to pay upon the fortuitous and extraneous happening of loss or damage from any cause whatsoever.* The uncontroverted evidence reveals that the loss was not attributable to normal wear and tear, inherent vice or gradual deterioration in the pipes or collars, nor to any wilful act by the plaintiff. The entire loss was clearly caused by negligence on the part of Associated, a fortuitous and extraneous event and not a necessary or normal consequence of the work." *Associated Engineers, Inc. v. American Nat. Fire Ins. Co., supra* at 353. (Emphasis supplied).

That negligence is no defense to a property loss claim under a fire or similar policy see:

*Central Manufacturer's Mut. Ins. Co. v. Elliott*, 177 F.2d 1011 (C.A.10, 1950);

*U.S. v. Eagle Star Ins. Co.*,  
201 F.2d 764 (C.A.9, 1952), reversing 196 F.2d 317.

### CONCLUSION

It is respectfully asserted that the judgment of the District Court should be reversed with directions that judgment be entered finding Fireman's Fund liable to Allison for the losses occasioned by the falling of the wind boom cable as claimed by Allison.

Respectfully submitted,  
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Phoenix, Arizona



I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney



No. 21180

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In the  
United States Court of Appeals  
*For the Ninth Circuit*

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C. H. LEAVELL & COMPANY, a Texas corporation, and RIVER CONSTRUCTION CORPORATION, a Delaware corporation, a Joint Venture, and ALLISON STEEL MANUFACTURING Co., an Arizona corporation,  
*Appellants,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation,  
*Appellee.*

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Brief of Appellee

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FILED

SEP 27 1956

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In the

# United States Court of Appeals

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C. H. LEAVELL & COMPANY, a Texas corporation, and RIVER CONSTRUCTION CORPORATION, a Delaware corporation, a Joint Venture, and ALLISON STEEL MANUFACTURING Co., an Arizona corporation,

*Appellants,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, a California corporation,

*Appellee.*

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## Brief of Appellee

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### JURISDICTION

The appellee concurs in appellants' statement of jurisdiction.

### STATEMENT OF THE CASE

By agreement between the parties herein, the case at bar was submitted for decision to the District Court upon an "Agreed Statement of Facts" (T.R. 23-30)\* in addition to several exhibits admitted in evidence. The District Court in

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\*T.R.—Transcript of Record.

its decision (T.R. 31-42) adopted the "Agreed Statement of Facts" as its findings of facts (T.R. 31). The appellants, however, in this appeal did not set forth the "Agreed Statement of Facts" upon which the case was tried, but rather presented a paraphrased and somewhat less than candid version of the "Agreed Statement of Facts." For this reason the "Agreed Statement of Facts" as adopted by the parties and District Court are set forth here:

1. The corporate status of the parties, the citizenship of each party is as alleged in Plaintiffs' Complaint. The amount in controversy in this cause, exclusive of interest and costs, exceeds the sum of \$10,000.00.

2. On or about November 28, 1961, C. H. Leavell & Company and River Construction Corporation, as a joint venture, (hereinafter referred to as "Leavell") contracted with El Paso Natural Gas Company to construct and erect a single span pipeline suspension bridge over the Flaming Gorge Reservoir in Wyoming, near Dutch John, Utah.

3. On or about December 1, 1961, Allison Steel Manufacturing Co., (hereinafter referred to as "Allison") entered into a subcontract with Leavell, under which subcontract Allison contracted to supply the required materials and construct and erect said bridge.

4. The specifications and design pursuant to which said bridge was to be constructed were prepared by or under the direction of El Paso Natural Gas Company and were submitted to Fireman's Fund Insurance Company (hereinafter referred to as "Fireman's Fund") prior to the time it executed the insurance policy upon which this suit has been brought.

5. Upon the award of the subcontract referred to in paragraph 3 hereof to Allison, Allison prepared and submitted to Leavell drawings and erection procedures plans

detailing and showing how Allison proposed to accomplish the construction and erection of said bridge for approval by Leavell. These plans and erection procedures drawings were not shown to or considered by Fireman's Fund prior to the execution and delivery of said policy of insurance by said Company.

6. Upon the award of said contract by El Paso to Leavell, Leavell applied to Fireman's Fund for a policy of insurance in favor of Leavell "For their account and/or the account of their Subcontractors" and Fireman's Fund issued its "Bridge Builders All Risks" Form insuring said insureds in the sum of \$767,206.00 on property described as "Single Span Suspension Pipeline Bridge to be located over the Flaming Gorge Reservoir." The copy of this insurance policy attached to Plaintiffs' Complaint is a true and correct copy of said policy of insurance. This policy of insurance was a form policy prepared by Fireman's Fund.

7. The plans and specifications for said bridge called for the erection of a high, generally "H" shaped tower on each side of the Flaming Gorge Reservoir supporting a set of 6 "main" cables anchored to the ground substantially back from the base of each tower and strung over the top of the tower across the Reservoir Gorge to the top of the opposite tower and in turn anchored in the ground substantially back from the base of the tower. These cables were 21 $\frac{1}{4}$ " in diameter and served to support the pipeline across the Flaming Gorge Reservoir as suspended by suitable attachments from and below these main cables.

8. A second set of cables was also called for by the plans and specifications known as "wind boom" cables. These cables, two in number, served the purpose of stabilizing the towers against the force of the wind. A boom (a long round timber or pole) was to be attached on the side of each

pull against this steel place, the weld gave way and the wind boom cable fell to the ground, shearing off the wind boom from the tower and causing other extensive damage to the tower and the cable itself.

15. Why the workmen did not follow the proper procedures and use the proper method in attempting to position this wind boom cable has not been established. Either these workmen had not reviewed the required erection procedures in this instance or "took a chance" thereby avoiding the extra work required in going to the top of the tower, disengaging the block and tackle from the top of the derrick and re-attaching it to the corner of the tower at the top of the tower.

16. These derricks were to have been removed from the top of the tower when they had served their purpose as they were not a part of the permanent installation.

### **QUESTION PRESENTED**

The basic issue on this appeal is whether the policy of insurance issued by appellee to the appellants afforded coverage for the particular loss which occurred in this case.

### **ARGUMENT**

There is no dispute as to the actual cause of the accident in question—the employees of the appellant Allison Steel Manufacturing Company (hereinafter referred to as "Allison") failed to follow the proper erection procedures when they used the derrick to lift the wind cables. The method of construction specified in the plans and erection procedure drawings was not followed and as a result the damage occurred. The policy of insurance issued by the appellee Fireman's Fund Insurance Company did not cover any damage or loss if the method of construction was changed during the policy term without approval. The pertinent language of the policy is as follows:

"4. This policy shall be void unless otherwise provided by agreement in writing added hereto, if:

"(a) The general design or method of construction be materially altered or changed during the policy term;"

There is little room for disagreement that if the derrick in question was not designed or intended to be used to lift the wind cable, but notwithstanding this it was used to lift the wind cable, it certainly constituted a material change in the method of construction. This change in the method of construction which caused the loss was precisely the type of risk excluded from coverage. It is obvious that the parties did not intend to purchase a policy of insurance covering the construction and erection of the bridge when the method of accomplishing the construction or erection would be changed by some workmen on the job. The District Court properly found that under the circumstances the policy of insurance did not provide coverage for the resulting loss. The Court said:

"The Court is of the view that this loss occurred during a period of time when the policy was not in effect because the use to which the derrick was put to lift the wind boom cables constituted a material alteration or change in the method of construction. It was agreed by the parties that the derrick as designed by Allison was intended to be used only for lifting and moving the main cables and was not designed for use in lifting and placing the wind boom cables. To say that the workmen's use of the derrick was a fortuitous event or accident is to ignore the plain and unambiguous language of the insurance policy." (T.R. 41)

The appellants' main contention is that since the particular erection procedure drawings (Exhibit 2a—d) were not

examined or seen by the insurance company prior to the issuance of the policy, any failure to follow such plans could not constitute a change in the method of construction within the meaning of the exception. The argument is without merit for the reason that the insurer was entitled to place reliance upon the supplemental erection procedure plans detailing how Allison proposed to accomplish the construction of the bridge particularly since such construction plans had to be approved by the Consulting Engineers hired by the El Paso Natural Gas Company (hereinafter referred to as "El Paso").

It should be noted here that the general design of the bridge was set forth in El Paso's plans and specifications (Exhibit 1). However, the method of construction was not fully set forth in El Paso's original plans and specifications but rather these plans contemplated additional plans and working drawings or erection procedures to be later furnished by the contractor (Allison in this case) which were necessary or required to supplement El Paso's plans and specifications. These supplemental plans had to be approved by the Consulting Engineers as required by El Paso's original plans and specifications. A brief review of Exhibit 1 will amply demonstrate this point. Section 2.1.8 entitled "Construction Plans" provides as follows:

"The Contractor shall prepare such construction plans as are necessary to show in detail the temporary work and *methods of construction* he proposes to use. In order to satisfy the Engineers that the Plans and methods he proposes using in constructing the work will furnish a completed Work in strict accordance with the Plans and Specifications, and within the time limits required, the Contractor shall submit complete prints of such plans to the Engineers, in triplicate, for examination and possible comments." (Emphasis Added)



Section 11.4.1 provides:

“Considerably in advance of the initiation of erection work, the Contractor shall submit to the Engineers working drawings of the methods of erection and guying which he proposes.”

Section 2.1.4 provides:

“Any deviation from the Plans, the Specifications and approved working drawings as may be required by the exigencies of the construction, shall in all cases, be approved by the Engineers in writing.”

It should be noted here that the term engineers referred to in Sections 2.1.8 and 2.1.4 is defined in Section 1.1.2 as the Consulting Engineers hired by the El Paso Natural Gas Company. It should also be noted that the term Contractor used in Sections 2.1.8 and 11.4.1 not only include C. H. Leavell & Company and the River Construction Corporation, but also any subcontractors which, of course, includes Allison Steel. Section 1.1.13 states that the:

“Contractor shall cause each assignee or sub-contractor to assume all obligations of Contractor hereunder to the full extent same may be applicable to the portions of the Work assigned or sub-contracted.”

It is clear that the insurer in determining the risk and in agreeing to provide the policy of insurance was well aware after reviewing El Paso's plans and specifications that there would be additional plans and specifications setting forth such things as the erection procedures for the wind cables and that such plans and specifications would have to be approved by the Consulting Engineers. The erection procedure drawings prepared by Allison Steel (Exhibits 2a—d), setting forth the method of construction for the erection of the wind cables were such additional plans. To

say that these additional plans were not incorporated and included in the general plans and specifications set forth by El Paso for the method of construction of the bridge flies in the face of reason and ignores the circumstances surrounding the entire transaction. The District Court succinctly analyzed the problem as follows:

"The fact that the plans were not approved by the insurance company, prior to the issuance of the policy, is immaterial here since the company had a right to rely on the method of construction to be submitted in accordance with sound engineering principles.

\* \* \* \* \*

"Certainly the method of construction to be followed in the building of the bridge was incorporated by reference in the policy and was, therefore, an integral part thereof."

It should be observed here that an exhaustive search of the case law has not revealed any decision substantially similar to the controversy presently under consideration. In such a circumstance it is well settled that with regard to the meaning of the words or terms in the policy, the proper criterion for construing such words or terms is to give them a meaning consistent with common understanding. See e.g., *American Casualty Co. of Reading, Pa. v. Myrick*, 304 F.2d 179 (5th Cir. 1962). In this regard the common meaning of the words "method" and "construction" are defined in *Webster's New 20th Century Dictionary*, Second Edition, as follows:

**Method:**

"1. a way of doing anything; mode; procedure; process; especially, a regular, orderly, definite procedure or way of teaching, investigating, etc."

### Construction:

"1. the act, or process of building, or of devising and forming; fabrication; erection.

2. the manner or method of building; the way in which a thing is made or put together; structure; organization; as, a machine of intricate *construction*."

There is no question that Allison-prepared supplemental plans (Exhibits 2a—d), detailing how the various cables were to be erected, set forth the "method of construction" for this phase of the building of the bridge and the District Court properly so found. There is also no question that the policy of insurance, although an "all risks" type, specifically and clearly excluded coverage for any loss resulting from an unauthorized change in the method of construction. It is fundamental that where the parties intend that a particular peril be excluded from a policy of insurance and that intent is clearly expressed, effect should be given to the exclusion. *American Casualty Co. of Reading, Pa. v. Myrick*, supra. There is no question that an insurer may lawfully limit liability by excluding certain risks from coverage, and while an insured is engaged in such risks, coverage is suspended. *Roberts v. Underwriters at Lloyds London*, 195 F. Supp. 168 (Idaho 1961). It should be re-emphasized here that the purpose of an exception in a policy is to take something out of the contract which would otherwise have been left in. *American Casualty Co. of Reading, Pa. v. Myrick*, supra; *D.M.A.F.B. Fed. Cr. U. v. Employers Mut. L. Ins. Co. of Wis.*, 96 Ariz. 399, 396 P.2d 20 (1964); *Maryland Casualty Co. v. Texas Fireproof Storage Co.*, 69 S.W.2d 826 (Texas 1934).

A careful review of the various exhibits and in particular exhibits 1 and 2 (a—d) will reveal that the District Court's

analysis of the problem and interpretation of the insurance policy coverage question was manifestly correct and although the problem is essentially a legal question, the District Court's careful analysis in this case should be entitled to great weight in this Court. See *Edwards v. American Home Assurance Company*, 361 F.2d 622 (9th Cir. 1966). The appellants' unfounded criticism of the reasoning and ruling of the District Judge who tried the case in the court below is wholly uncalled for. Nothing in the record, or otherwise we might add, justifies the charge that the District Judge "has fallen into error which approaches in degree the harsh appellation of an absurdity" (Br. 10)\*; or the statement that the Court "laid aside all consideration of what the parties had in view as the risk insured" and "relied upon reasons for denying coverage which find no support, even remotely, in the language of the policy" (Br. 19); or the statement that the Court's conclusion "must be rejected as wholly without support in contract or insurance law and quite a war with reason and logic" (Br. 20). Nor can we find any justification for the gratuitous remark concerning "a hundred Chinese Coolies pulling upon a rope" (Br. 21).

### CONCLUSION

It is respectfully urged that the judgment of the District Court be affirmed.

Respectfully submitted,

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\*Br.—Opening Brief of Appellants.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CRAIG R. KEPNER

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**No. 21180**

IN THE

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

C. H. LEAVELL & COMPANY, a Texas  
corporation, and RIVER CONSTRUCTION  
CORPORATION, a Delaware corporation,  
a Joint Venture, and ALLISON STEEL  
MANUFACTURING CO., an Arizona cor-  
poration,

Appellants,

vs.

FIREMAN'S FUND INSURANCE  
COMPANY, a California corporation,

Appellee.

Appeal from the  
United States  
District Court for  
the District of  
Arizona

APPELLANTS' REPLY BRIEF

**FILED**

MARK WILMER  
SNELL & WILMER

OCT 11 1966

Attorneys for Appellants

WM. B. LUCK, CLERK

NOV 4 1966



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**No. 21180**  
IN THE  
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C. H. LEAVELL & COMPANY, a Texas  
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APPELLANTS' REPLY BRIEF

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The suggestion made by appellee that appellants' fact statement is "somewhat less than candid" may come within some oblique application of the rationale of the rule of *New York Times Co v. Sullivan*, 375 US 254, 84 S Ct 710, 11 L ed 2d 686 (1964) as "uninhibited and robust debate." However, it would have been helpful if in fact appellants' bias induced a more optimistic view of the facts that the record warrants, appellee in justification of its imputation of chicanery to appellants, had cited book and verse to justify its unsupported assertion.

The net of appellee's responding argument is that the negli-

gence of Allison's employees, in "taking a chance" by using a hoisting block and tackle attached in a different manner to a different part of the tower from that directed by Allison, in lifting a wind boom cable constitutes a "change in method of construction," thereby voiding the policy coverage.

*There was no claim or showing that any responsible official of Allison knew of or authorized this shortcut. It could not therefore constitute a "change in method of construction" by Allison; at best it was an unauthorized shortcut by Allison's employees which certainly is one of the risks the contractor fears and insures against — carelessness or other departure from the standard of care expected of its employees.*

When appellee argues that the insurer was entitled to assume and rely upon the assumption that appropriate working plans and procedures would be outlined by Allison and that departure therefrom would void the policy coverage, appellee does assert what amounts to an absurdity. By like reasoning, since the plans and specifications require that the construction and work shall be done in a careful and workmanlike manner, the conclusion follows that any loss resulting from negligence on the part of an employee likewise does not come within the "all risks" coverage provided by appellee's policy of insurance.

Appellants have no apology to offer for their criticized assertion to the effect that if Allison elected to use 100 Chinese coolies hauling on a rope to raise material into place it was no concern of the insurer. Insurer made no inquiry as to, and received no assurances as to, what source of energy was to supply the power to erect any part of the structure.

We likewise offer no apologies for the balance of the criticized arguments for which appellants are taken to task at page 12 of Appellee's Brief.

We again say that for appellee to assert that working drawings



which appellee never saw or relied upon in considering if it desired to write the policy here sued upon or in computing the premium to be charged therefor are, in legal effect, written into and become part of a policy of insurance written, (probably before these drawings were even made) comes probably nearer to an absurdity than a mere approach.

The casualty which caused appellee's loss here sued for was caused by the inattention or disobedience of Allison's employees to Allison's orders as to how the task at hand should be accomplished. This may have been intentional and the result simply of the employees' desire to make use of a shortcut, thereby saving time and effort, or it may have been that in the stress of working in this isolated area, plans were not readily at hand or not too closely adhered to, but in any event, it is something which was not authorized by or known to Allison prior to the time the casualty occurred. We therefore say that to contend such a wrongful deviation by a workman from his employer's directions as to how a task should be performed can be considered a "change in method of construction" is, to say the least, lacking in substantial merit.

*CONCLUSION*

The judgment below should be reversed with directions to enter judgment finding appellants are entitled to recover their losses attributable to the casualty described in Appellants' Complaint.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

---

Mark Wilmer

BRIEF FOR PETITIONER  
SOUTHWESTERN CABLE CO.

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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Case No. 21,183 ✓

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SOUTHWESTERN CABLE CO.,

v.

*Petitioner,*

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

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Case No. 21,192

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MISSION CABLE TV, INC.,  
PACIFIC VIDEO CABLE CO.,  
and  
TRANS-VIDEO CORP.,

v.

*Petitioners,*

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

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ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
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**BRIEF FOR PETITIONER  
SOUTHWESTERN CABLE CO.**

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## JURISDICTIONAL STATEMENT

Jurisdiction is founded on the provisions of Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. 402(a), and Section 2 and 3 of the Judicial Review Act of 1950, as amended, 5 U.S.C. Sections 1032 and 1033. The venue of this proceeding is placed in the United States Court of Appeals for the Ninth Circuit, pursuant to Section 3 of the Judicial Review Act of 1950, 5 U.S.C. 1033.

The Order which this Court is here asked to review and set aside was issued by the Federal Communications Commission (herein "Commission") on July 25, 1966, as corrected by Erratum released July 26, 1966 in proceedings before it styled Midwest Television, Inc. (KFMB-TV), Petitioner, and Southwestern Cable Co., *et al.*, Respondents, FCC Docket No. 16786. (R. 577-595, 596-598) That Order, *inter alia*, granted the request of Midwest Television, Inc. for "temporary relief" and, without any opportunity for prior hearing, directed Petitioner to confine delivery of Los Angeles television signals over its community antenna television system only to those subscribers within geographic areas served on February 15, 1966 and to persons who began receiving service, or who had accepted service prior to the date of the Commission's Order.

The Commission order further provided that such "temporary relief" shall not become effective until judicial determination of the motion for a stay in the case of any respondent which seeks judicial review and a judicial stay within fourteen days of the Order. Such motion was timely filed by the Petitioner; and this Court on August 23, 1966, issued and interlocutory injunction staying the effectiveness of the above described Order, pending disposition of this Review proceeding.

## STATEMENT OF THE CASE

Petitioner operates a community antenna television (CATV) system pursuant to a 30 year franchise issued by the City of San Diego and which became effective October 30, 1964.<sup>1</sup> This franchise granted Petitioner the right to operate a CATV system within the corporate limits of San Diego in an area lying north of the San Diego River channel. By unanimous vote, the San Diego City Council declared the proposed CATV service to be in the ". . . best interest of San Diego and its inhabitants". Pursuant to this franchise, Southwestern promptly undertook construction of a CATV system and commenced service to subscribers on December 22, 1965. As of February 15, 1966, the system consisted of approximately 45 miles of plant with approximately 350 subscribers who were provided with the signals of the local San Diego television stations and Los Angeles television stations.

During the time of this construction, the Commission exercised no authority over CATV systems, which, like Petitioner received television signals by off-the-air pickup. The Commission's relationship to CATV was indirect and was limited to systems which depended upon microwave facilities.

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<sup>1</sup> CATV systems are generally located in areas where reception of television signals is not feasible or is unsatisfactory because of terrain, weather, or because the area is too far from a television station. In such area, a community antenna is erected on a mountain or other high elevation where the reception of the desired stations is strong and clear. From such central location ("head-end" site) the CATV system distributes television signals by wire to homes of the viewing public who subscribe and who are usually required to pay an installation charge and a fixed monthly fee.

In the case of San Diego, the essential effect of CATV is not merely to solve reception problems stemming from terrain, distance and weather but also to enable San Diegans, who now receive programs on only two VHF television stations to secure as wide a choice of television programs, news, documentaries, sports information, educational programming, and entertainment as their neighbors a few miles to the north in Orange County and Los Angeles, where seven VHF television stations are allocated.



It was not until March 8, 1966, with the release of the Second Report and Order<sup>2</sup> that the Commission purported to assert regulatory authority over CATV systems of the type constructed and operated by Petitioner.<sup>3</sup>

In essence, that Report and Order and the rules adopted therein regulated and limited the operation of CATV systems in three major respects. First, the "carriage" rules provide that CATV systems are required to carry the signals of local and nearby television stations. Second, the "exclusivity" rules provide that a television station with a stronger signal over the CATV community could prevent the system from carrying on the same day the signal of another station with a weaker signal which duplicates its programs.<sup>4</sup> Third, the "Top 100 Market" rule provides that in the markets so designated by American Research Bureau, a private organization engaged in market research and television ratings, CATV systems could not carry television broadcast stations which did not place a signal of Grade B strength over the community serviced by the CATV system, unless authorized by the Commission.

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<sup>2</sup> *Second Report and Order*, Dockets 14895, 15233, 15971 (released March 8, 1966), published in 31 Fed. Reg. 4540.

<sup>3</sup> At the same time that the Commission asserted that it had such jurisdiction it noted that — "We stated in the notice (par. 31) that we would welcome (i) a Congressional guidance as to policy and (ii) Congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. In this report, we stress again the desirability in our view of congressional guidance in this important area. But thus far the congressional guidance has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining policy guidance in the CATV field." (*Ibid.* Paragraph 21 at 4543.)

<sup>4</sup> The Commission rules governing television broadcast stations recognize three grades of signal strength — Principal City Grade, Grade A and Grade B. These grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade - 90%; Grade A - 70%; Grade B - 50%.

The "Top 100 Market" rule was announced by a Commission press release on February 15, 1966, and purported to become effective on that date, despite the fact the rules were not adopted until March 4, 1966, were not released to the public until March 8, 1966, and were not published in the Federal Register until March 17, 1966. It is noted further that the statement of the rules as announced in the press release differed materially from the provisions of the rules as subsequently published.

The Commission's asserted authority did not include a claim of power to license the operation of CATV systems. On the contrary the Commission has uniformly recognized that the licensing of CATV systems is the proper function of local authorities.

On March 17, 1966, Midwest Television, Inc., licensee of KFMB-TV, San Diego, California, filed a petition with the Commission and on April 4, 1966, filed a supplement thereto, pursuant to the provisions of Sections 74.1107 and 74.1109<sup>5</sup> of the Commission's Rules requesting that the Commission (1) grant Midwest immediate temporary relief by directing Southwestern and other CATV systems operating in the area "*. . . to cease and desist* from delivering Los Angeles signals beyond the boundaries of the geographical areas in which it was operating on February 15, 1966 . . ." (emphasis added); and (2) grant Midwest permanent relief based upon the pleadings, or after hearing if one be deemed necessary, confining carriage of Los Angeles signals by such CATV systems. (R. 1-21, 121-137)<sup>6</sup> Petitioner filed responsive pleadings to the Midwest petitions which requested, in the alternative, that the Commission deny or dismiss the Midwest petitions. (R. 265-328; 330-362; 377-384; 518-

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<sup>5</sup> F.C.C. Reg. § 74.1107, 31 Fed. Reg. 4572 (1966). F.C.C. Reg. § 74.1109, 31 Fed. Reg. 4572 (1966).

<sup>6</sup> References are to the page numbers of the Record as certified to this Court by the Commission under date of August 26, 1966.

557) In addition, Petitioner filed a Statement of Position which set forth its view of the legal questions presented. (R. 363-376)<sup>7</sup>

On May 31, 1966, a petition was filed with the Commission which pointed out that in another pending case (Docket No. 16575) before it, testimony of an expert witness of the Commission established that the Grade B contours of all the Los Angeles VHF stations fell within the city limits of San Diego. The petition was filed by Mission Cable TV Inc. and the operators of other CATV systems, Petitioners in this Court in Case No. 21192, and was entitled "Supplement to 'Opposition to Petition and Supplement to Petition for Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV systems carrying Signals of Los Angeles Stations into the San Diego Area'." On June 3, 1966, the Commission returned the pleading with a letter advising that it would take official notice of the matter.

On July 25, 1966, the Commission issued its Memorandum Opinion and Order under review herein (R. 577-595). The Commission held that a hearing was required in view of substantial public interest questions and "... the number of unresolved issues present." Although the Commission had previously stated that it would take official notice of the testimony of its own expert, it did not even advert to this evidence but instead stated that "... There is controversy as to whether some of the

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<sup>7</sup> Southwestern contended that the restrictions and limitations imposed on CATV by the Commission's Rules were illegal for the reason that:

"(1) The Commission lacks statutory authority.

"(2) They constitute an unconstitutional infringement on freedom of speech.

"(3) They constitute the taking of property without due process of law.

"(4) They do not comply with required statutory procedures.

"(5) They are based upon standards which are arbitrary and capricious."



respondents' systems operate within the Grade B contour of some of the Los Angeles stations . . .".<sup>8</sup>

With respect to the request for temporary relief, the Commission concluded that such relief ". . . is necessary and appropriate 'before consequences *possibly adverse* to the public may develop'." (Emphasis added.) (Memorandum Opinion and Order, Paragraph 20; R. 589.) In response to the contention that issuance of a Cease and Desist Order could not be issued peremptorily as requested by Midwest, but rather required observance of the specified notice and hearing provisions of Section 312 of the Communications Act, the Commission concluded that the broad mandate of the Communications Act dispenses with the need for explicit statutory authority. (Memorandum Opinion and Order, Paragraph 21, R. 590)

In response to Southwestern's contentions that the Commission's Rules were illegal, the Commission, in a footnote, stated only:

"Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order."  
(Memorandum Opinion and Order, Page 7, Footnote 8; R. 583)<sup>9</sup>

Finally, the Commission ordered that the proceedings be designated for hearing at a time and place to be specified in a further order upon nine stated issues. The Commission granted the request of Midwest for "temporary relief" and with respect to Southwestern directed it to confine delivery of the Los Angeles signals carried on its system to subscribers within areas served on February 15, 1966, and to persons who

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<sup>8</sup> The Commission also concluded "We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on these matters." (Memorandum Opinion and Order, Paragraph 18; R. 588.)

<sup>9</sup> No action has been taken to date on this Statement of Position.

began receiving service or who had accepted service prior to the date of the Commission's Order.

The stay which was issued by the Commission was not based on any finding or judgment that Petitioner was in violation of any Commission rule or applicable provision of the law. On the contrary, it was conceded that Petitioner was in full compliance with all such regulations and laws. The Commission order was premised on the assumption that "... as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations..." (Memorandum Opinion and Order, Paragraph 19, R. 589).

The so-called "temporary action" which was issued by the Commission was not circumscribed by any specific time period; rather it was to be effective pending the outcome of the entire proceeding before the Commission. (R. 594) Such action necessarily includes a hearing before an Examiner, proposed findings, an initial decision, exceptions and review by the Review Board, a petition for review by the full Commission, and action on any subsequent petitions for reconsideration, which are customarily filed in proceedings of this nature.

The Commission action was issued notwithstanding uncontroverted evidence that Petitioner would be faced with insolvency as a result thereof. (R. 352-354, 555)

On August 10, 1966, this Court issued a stay of the Commission's "temporary relief". The respondents filed a motion for reconsideration, and oral argument was held on said motion on August 22, 1966. This Court, on August 23, 1966, issued an interlocutory injunction against that portion of the Commission's Order which would have required Petitioner to desist from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966. The Court noted *inter alia* in issuing this interlocutory injunction that Petitioner would suffer irreparable damage if the injunction was not issued. Further, this Court noted expressly that

the Government had conceded that Petitioner was not in violation of the governing statutes and rules.

Comparable injunctions were issued against similar Commission Orders affecting Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp. whose cases have been consolidated with the subject Petitioner's case by Order of this Court filed August 23, 1966.

### QUESTION PRESENTED

The question presented which will be argued in detail in this Brief is as follows:

Whether the Commission's restraint, without hearing, of Petitioner's admittedly lawful operation of a community antenna television system, constitutes an illegal restraint, issued without statutory authority, and in violation of Petitioner's statutory rights.

### SPECIFICATION OF ERROR <sup>10</sup>

The Commission's restraint, without hearing, of Petitioner's admittedly lawful operations of transmitting intelligence and communications to the public by a community antenna television system constitutes an illegal restraint, issued without statutory authority, and in violation of Petitioner's statutory rights.

### SUMMARY OF ARGUMENT

The Commission is without statutory power to grant temporary relief and to stay respondents' lawful operations without a hearing. The Commission was created by an Act of Congress and it has no powers

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<sup>10</sup> For the convenience of this Court, Petitioner herein shall argue the error specified herein which is fully dispositive of the issues in this case. Petitioner shall incorporate by reference and adopt as its own the arguments advanced in support of the remaining specifications of error by Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp. in the Brief to be filed in Case No. 21,192.



except the powers granted therein. The Commission concedes that the Act contains no provision expressly empowering it to issue a cease and desist order without a hearing. Indeed, the only provision in the Act (Section 312) which deals with cease and desist orders expressly provides that there *must* be a hearing before such an order can be issued.

In response to the clear mandate of Section 312, the Commission makes this extraordinary argument: Section 312 applies only to *unlawful* activity, in which case a hearing would be required. But Petitioner is not engaged in any unlawful activity. Therefore, in the Commission's view, Section 312 is inapplicable and it can issue a stay against Petitioner without a hearing.

Congress intended no such preposterous result. It could envision the need for cease and desist orders where rules or regulations were being violated, but it wrote in the safeguard of the hearing requirement. It is apparent that Congress did not envision a need for cease and desist orders against lawful activity, so the Communications Act is simply silent on this subject.

The Commission endeavors to replace this statutory silence by a reference to Section 4(i) of the Communications Act but this reference is patently in error. 47 U.S.C. § 154(i). Section 4(i) expressly relates only to acts, rules, and orders of the Commission which are "not inconsistent with this Act." Inasmuch as the Act expressly requires a *hearing* for a cease and desist order when the action involved is *unlawful*, it is absurd to contend that it is not inconsistent with the Act to grant a cease and desist order against *lawful* activity *without a hearing*.

Such an order in the instant case simply means that for an indeterminate period of time the residents of San Diego will be deprived of a full variety of television choice and diversified programs of entertainment, news, political broadcasts and educational material — all of which would be provided by Petitioner's CATV system operating in full compliance with the Commission's substantive rules.

## ARGUMENT

## I

**The Commission's Restraint, Without Hearing, of Petitioner's Admittedly Lawful Operations of Transmitting Intelligence and Communications to the Public by a Community Antenna Television System Constitutes an Illegal Restraint, Issued Without Statutory Authority, and in Violation of Petitioner's Statutory Rights.**

*A. Nature of the Commission's Action*

The Commission has committed patent and egregious error in issuing a peremptory stay, without hearing, of Petitioner's lawful activities. This is manifest in the Commission's attempt to obscure the nature of the action taken by it. On the one hand, the Commission explicitly noted that it had been requested to order Petitioner to ". . . cease and desist . . ." (Memorandum Opinion and Order, Paragraph 1; R. 578). In subsequent pages of its Opinion, the Commission then speaks in terms of a ". . . grant [of] temporary relief, pending final disposition of this proceeding . . ." (Memorandum Opinion and Order, Paragraph 24; R. 592). It is Southwestern's view that such semantic differences are irrelevant niceties; that a "stop order," whether it be termed "cease and desist" or "temporary relief," produces precisely the same result. Irrespective of how the Order is labeled, it is obvious that it is a sanction which requires Petitioner to cease and desist from continuing its normal activities which are perfectly legal. The Commission's linguistic gymnastics are understandable in the context of the applicable governing statute. The Commission was forced to engage in this verbal cover-up, for if its action is regarded as a cease and desist order — which it plainly is — then the Commission has violated the specific procedural requirements of Section 312(b) and (c) of the Communications Act, 47 U.S.C. §§ 312(b) and (c). (See Appendix hereto.)

*B. Provisions of Section 312 of Act  
and Commission Rules*

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Section 312(b) and (c) of the Communications Act provide explicit and unequivocal requirements for the issuance of a cease and desist order, including notice and the prior right to be heard in an evidentiary hearing. In the issuance of its order in this case, the Commission failed to comply with a single one of the foregoing absolute requirements of the Act. Instead, it proceeded upon the petition of an interested party only. It did not serve an order to show cause. It did not afford to the other parties an opportunity to be heard or present evidence upon appropriate notice.

Further, the Commission's departure in this instant case from these established statutory standards is made even more incomprehensible by reference to the Commission's own Rules and Regulations and its practices thereunder. It is completely clear that in adopting the Rules and Regulations involved herein, the Commission itself did not contemplate such a peremptory procedure in direct violation of the requirements of Section 312 of the Communications Act.

Section 74.1107 as adopted by the Second Report and Order provided, in part, that —

"In the event an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is called for in the public interest, and if so the nature of such relief . . ." (*op. cit. supra*, note 5)<sup>11</sup>

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<sup>11</sup> By Memorandum Opinion and Order, released April 21, 1966, 3 F.C.C.2d 400, 7 Pike & Fischer R.R.2d 1570, the Commission "clarified" the procedural aspects of Section 74.1107(d) by amending the last sentence of Section 74.1107(d) to delete reference to evidentiary hearing. The sentence as amended provides:

"The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in



In explaining the procedures contemplated to implement the provisions of this section, the Commission stated:

"... enforcement will be through the cease and desist procedures set forth in Section 312(b) and (c) or pursuant to Section 502 of the Act and will not include other sanctions applicable to licensees." (Second Report and Order, Paragraph 101, *op. cit. supra*, note 2 at 4556)

### C. Prior Commission Rulings

In a number of actions taken by the Commission subsequent to the Second Report and Order looking toward the implementation of the rules adopted therein, the Commission, with one exception discussed below, consistently followed the required procedures of Section 312 of the Communications Act, and afforded the respondents a hearing to determine whether or not a stay should issue. *Mission Cable TV, Inc. and Trans-Video Corp.*, 3 F.C.C.2d 296, 7 Pike & Fischer R.R.2d 419 (1966); *Buckeye Cablevision*, 7 Pike & Fischer R.R.2d 26 (1966); *Muskegon Television System and Booth Communication Co.*, 3 F.C.C.2d 713, 7 Pike & Fischer R.R.2d 415 (1966).

Each of these cases involved attempts by CATV systems, in contravention of the provisions of Section 74.1107 of the rules, to extend the signals of television stations beyond their predicted Grade B contours.

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the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief."

The amendment was adopted during the pendency of this case before the Commission and three days after the filing of Southwestern's pleadings in response to the Midwest petition. The amendment on its face is not addressed to the requirements of Section 312. In any event, for the reasons stated herein, the Commission cannot evade the explicit statutory requirements by a "clarifying" procedural change in its own rules. (See Appendix hereto for statement of applicable Commission rules.)

In each case, the Commission sought to restrain such extensions by the issuance of an order pursuant to the provisions of Section 312 of the Communications Act directing such systems to show cause why they should not cease and desist from such extensions of service. Such cases differ from the case under review herein in only one material respect. In the case under review, the Commission has not found that Petitioner's operations are in violation of Section 74.1107 of its rules. On the contrary, its order is premised on the assumption "...as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations . . ." <sup>12</sup> (Memorandum Opinion and Order, Paragraph 19, R. 589). Moreover, this Court in its issuance of its temporary injunction has expressly found that "... respondent Commission conceded that none of the Petitioners are presently in violation of the governing statutes and Commission rules . . .".

The Commission's action herein therefore presents the anomalous — and indeed absurd result — that systems operating in violation of the Commission's rules are entitled to, and in fact do receive, the protection and enjoy the safeguards of the hearing requirements of Section 312,

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<sup>12</sup> In view of this assumption (which, in fact, had been established) the stay order issued by the Commission is grossly arbitrary and capricious. For, in a proceeding involving the identical question in the neighboring community of Poway, the Commission reached the exact opposite result and held:

"In view of our finding, it follows that if any portion of the cable system operates within the Grade B contour of any station, the signal of that station may be carried to subscribers throughout the system."

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"Since some portion of the CATV system lies within the Grade B contour of each of the aforementioned television stations, no violation of Section 74.1107 has been established because of carriage of these on the CATV system." *Mission Cable TV, Inc. and Trans-Video Corp.*, 4 F.C.C.2d 236, 7 Pike & Fischer R.R.2d 631 (1966). The same result was reached in *Buckeye Cablevision, Inc.*, 3 F.C.C.2d 798, 7 Pike & Fischer R.R.2d 423 (1966).

whereas a system which does not violate the rules but conforms to such rules is not entitled to a hearing and is subject to a peremptory stay order. Such arbitrary administrative action has never been countenanced by the judiciary.

As recently as September 16, 1966, a long-established judicial principle was invoked by the United States Court of Appeals for the District of Columbia Circuit which issued a stay *pendente lite* of the Commission's cease and desist order which had been issued against a community antenna television system proposing the importation of signals from four television stations in Milwaukee and one in Chicago. *Booth American Company v. FCC*, No. 20,367. In issuing the stay, the Court stated first that irreparable injury flows from the termination or suspension of operations which were commenced when lawful. Of decisional significance to the subject proceeding, the Court then stated "We think the cease and desist order must rest on a generally valid basis for stopping the operations of a CATV system, set forth expressly or implicitly in the Commission's rules."

As noted above, in one other case, *Courier Cable Co., Inc.*, 7 Pike & Fischer R.R.2d 372 (1966), the Commission did not comply with the hearing provisions of Section 312 but issued a stay in the form of "interim relief." That case, however, unlike the case involved herein, involved an extension of Grade B signals in violation of Section 74.1107 of the Commission's Rules. The Commission's decision in that case explicitly noted, however, that —

"... the relief afforded here will be for a short period of time. Responsive pleadings are due to the petition for permanent relief within approximately three weeks and we expect to expedite our consideration of this matter. If, upon review of all of the information then before us, it is determined that a hearing is necessary, the interim relief here afforded can then be appropriately modified pending the outcome of the hearing." (7 Pike & Fischer R.R.2d at 372)



In the case herein, no finding was made by the Commission that the stay ". . . will be for a short period of time." On the contrary, the stay imposed herein is issued pending the outcome of a hearing ordered by the Commission ". . . at a time and place to be specified in a further order . . ." By subsequent order of the Hearing Examiner (September 12, 1966), the hearing has been scheduled to convene on December 6, 1966. In light of the number and complexity of the hearing issues, it is unlikely that the hearing designated by the Commission will be concluded and a final opinion rendered for well over a year from this date. And by the terms of the Commission's action under review herein, the injunction *pendente lite* which it has issued against the lawful operation of Petitioner's CATV system will remain in effect for that extended and indefinite period.

In the light of the foregoing, it is respectfully submitted that the action taken by the Commission in the within case is nothing more than a cease and desist order issued illegally in view of the failure to comply with the applicable safeguards and provisions of Section 312 of the Communications Act.

#### D. Legislative History of Section 312

The Commission's attempt to avoid the substantive requirements of Section 312 by labeling its Order as involving mere "temporary relief" must fail for the simple reason that the Commission has no statutory authority to issue such relief. It is axiomatic that the Commission has no authority except as conferred upon it by statute. *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Board*, 112 U.S. App. D.C. 290; 302 F.2d 875 (1962). Prior to the adoption of Section 312 of the Communications Act, the only statutory sanction available to the Commission involved the power to revoke or refuse licenses. This limitation on the Commission's authority was recognized expressly by the Supreme Court:

". . . When to assert its undoubted power to regulate

radio channels, Congress set up the Federal Communications Commission, it prescribed licensing as the method of regulation. USCA § 307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the 'touchstone' of 'public convenience, interest, or necessity.' Since the licensee receives no rights in the channel beyond the term of its license, the Commission may grant a license to a competitor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. Federal Communications Com. v. Sanders Bros. Radio Station, 309 US 470, 475, 84 L ed 869, 874, 60 S Ct 693; National Broadcasting Co. v. United States, 319 US 190, 218, 227, 87 L ed 1344, 1363, 1368, 63 S Ct 997. These cases make clear that the Commission's regulatory powers center around the grant of licenses. *They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions.*" *Regents of Georgia v. Carroll*, 338 U.S. 586, 598-599 (1950). (Emphasis supplied)<sup>13</sup>

In that same case, the Supreme Court noted that the Commission had been actively engaged before Congress in endeavoring to seek authority for additional sanctions but that the Commission's requests for legislative action ". . . did not go beyond asking for power to issue a cease and desist order against a licensee." (*Ibid.* at page 602)

Subsequent to the issuance of the Supreme Court's opinion in the *Carroll* case, Congress, through Section 312 of the Communications Act, granted to the Commission the power to issue cease and desist orders. However, the legislative history of Section 312 makes it abundantly clear

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<sup>13</sup> It is significant, in the purported regulation of CATV, that the Commission did not assert any licensing authority. On the contrary, licensing authority was disavowed and a limited regulatory authority only was asserted.

that this new sanction was limited in scope, and could be used only in certain specific instances, and then only in accordance with carefully enunciated procedural safeguards.

In the Congressional hearings on the 1952 amendments, then acting Chairman Hyde testified that "...the proposed legislation would require a show-cause type of procedure whenever the Commission would issue a cease and desist order." (*Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce*, U. S. Senate, 81st Cong., : 1st Sess., June 16, 17, 1949, page 41.) In later hearings, the Commission offered a proposed subsection (c) to Section 312 that would clearly delineate revocation and cease and desist order procedures. The Commission specifically proposed that it should serve upon the party involved an order to show cause why an order of revocation or cease and desist should not be issued. "The party would be given an opportunity to demonstrate at a hearing why no such order should be issued, and only after such a hearing would the Commission be authorized to issue an order revoking or suspending a license or *requiring a party to cease and desist from any action.*" (Emphasis added) (*Hearings before the Committee on Interstate and Foreign Commerce*, House of Representatives, 82nd Cong., 1st Sess., April, 1951, page 98, 101.) Clearly, therefore, the cease and desist sanction added to Section 312 by the Communications Act Amendments of 1952 was conceived by Congress and urged by the Commission itself only upon compliance with the prescribed procedures. It is clear, further, that Section 312 contains the sole administrative sanction available to the Commission and that the Commission has not been given any express statutory authority to issue the type of "temporary relief" it promulgated in this case, without a hearing.<sup>14</sup>

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<sup>14</sup> In fact, the only instance where the Commission can proceed, without hearing, is derived from its power to suspend tariffs as conferred by Section 204 of Title II of the Communications Act and even this power is specifically limited to a period of three months. 47 U.S.C. 204.



It is clear, too, that if Congress had wanted to grant this authority to the Commission, it knew how to make such an express statutory delegation. Congress has demonstrated this repeatedly in its highly limited and carefully conditioned grants of authority to other administrative agencies to issue temporary orders without hearing. For example, the Securities and Exchange Commission has the power summarily to suspend trading in any registered security for a period of not exceeding ninety days. 15 U.S.C. § 78 s(4). Permits issued under the Food, Drug and Cosmetic Act can be suspended as a measure necessary to protect public health but even here the permittee is entitled to seek and the Agency is adjured to hold a "prompt hearing" (21 U.S.C. § 344(b)). The Interstate Commerce Commission has the power to suspend permits on fifteen days notice (49 U.S.C. § 312(a)). The Federal Aviation Agency, as a matter of safety regulation, authorizes suspension of specifically named certificates, without hearing and in cases of emergency, but even in such critical cases, the Board must dispose of any appeal therefrom within sixty days (49 U.S.C. § 1429).

Indeed, Section 303(m)(1) and (2) of the Communications Act confers comparable and equally limited authority on the Commission. Pursuant to the authority of this section the Commission may ". . . suspend the license of any operator . . ." in specified circumstances. However, such authority is explicitly circumscribed by further requirements that such order of suspension shall not take effect until fifteen days notice in writing to the operator affording him the opportunity for a hearing upon such order. Further, it is provided that in the event such a hearing is requested ". . . said order of suspension shall be held in abeyance until the conclusion of the hearing . . . Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension."

In the light of the foregoing provisions of the Communications Act and its legislative history, it is incontrovertible that the Commission does not have authority to issue the order herein without a hearing.

*E. Controlling Judicial Precedents*

The same conclusion is impelled by consistently established judicial precedents. In the *Standard Airlines* case, the Court of Appeals for the District of Columbia Circuit ruled that the Civil Aeronautics Board could not lawfully suspend a letter of registration granted to an irregular air carrier, in the absence of express statutory authority for such extraordinary action. *Standard Airlines, Inc. v. Civil Aeronautics Board*, 85 U.S. App. D.C. 29; 177 F.2d 18 (1949). The Court squarely rejected the Board's contention that it could validly reserve to itself the right to suspend without hearing an irregular operation which was exempted from the normal requirements of the statute. The Court stated:

"Standard also argues that suspension of an air carrier's operating authority without a hearing is outside the authority delegated to the Board by the statute. It points to other portions of the Act which deal with suspension. Section 401(h), dealing with certificates, and Section 402(g), dealing with foreign air carrier permits, require notice and hearing before suspension. The only specific authority granted to the Board by the statute for suspension without a hearing, is conferred by Section 1005(a) and is expressly limited to emergencies affecting safety. The question, then, is whether the Board can, consistently with the statute, create another exception wherein notice and hearing are not required.

"It is true that the Board has authority, under Section 205(a) of the Act, to make rules and regulations consistent with the provisions of the Act, and authority, under Section 416(b)(1), to exempt air carriers from the requirements of the Act or regulations passed pursuant thereto. But even in respect to emergencies affecting safety, Congress deemed it necessary to say specifically that a suspension could be without hearing. If Congress had intended that suspension for ordinary violations of the Act or regulations, not so critical as safety emergencies, could be without hearing, it would seem that it

would have made appropriate provisions in the statute. It did not do so." (*Ibid.* 177 F.2d at Page 21)

The *Standard Airlines* case is fully dispositive of the asserted right of the Commission to issue a temporary order restraining the operations of Petitioner in the instant case. As in *Standard*, the Commission has arbitrarily determined that it can proceed to grant stays without hearing. As in *Standard*, the Commission has been unable to cite any specific statutory section creating this sanction. The Commission's blatant attempt to arrogate to itself such power should now be reversed.<sup>15</sup>

That the Commission's action violates sound and established judicial precedent is confirmed also by the Court of Appeals for the District of Columbia Circuit in its recent opinion in *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Board*, 112 U.S. App. D.C. 290; 302 F.2d 875 (1962). That case raised the issue as to whether the Federal Maritime Board could lawfully issue an order prohibiting a voluntary association of steamship companies from assessing fines or collecting fines pending Board hearing. The Board argued that this temporary order was necessary to prevent irreparable injury. Even though the

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<sup>15</sup> The Commission endeavors to ignore the full import of the *Standard Airlines* case by citing *Federal Communications Com. v. Station WJR*, 337 U.S. 265 (1949), but this case simply held that issues raised upon demurrer do not require oral argument. This is completely distinguishable from Petitioner's case where serious and complex controverted issues are involved. Other cases cited by Respondents are also totally inapposite. *Public Service Commission v. Federal Power Commission*, 117 U.S. App. D.C. 195, 327 F.2d 893 (1964), held only that the Federal Power Commission had the authority to issue temporary licenses to independent producers who were not specifically identified in the governing statute. This cited case obviously involves a grant of a privilege and not the issuance of a sanction without hearing. Compare also *R. A. Holman & Co., Inc. v. S.E.C.*, 112 U.S. App. D.C. 43; 299 F.2d 127 (1962), *cert. den.*, 370 U.S. 911, which involved only the authority of the Securities and Exchange Commission to suspend, pending a hearing, a broker-dealer's *exemption* from the need to register certain securities. Here the asserted power of the SEC had been explicitly reviewed and approved by Congress and there were claims of fraud and evident danger to the public interest.



order was issued after oral argument, the Court of Appeals, finding no specific statutory authorization for such order, set it aside, declaring:

"The power which the Board now claims is in many ways a drastic one, and in fact more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct deemed in violation of law. . . . But the Board is not a court, and cannot rely for its action on the powers of a court of equity. On the contrary, the law is settled that an administrative agency can exercise only those powers conferred on it by Congress. See, e.g., *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 322, 81 S. Ct. 1611, 6 L. Ed. 2d 869 (1961); *United States v. Seatrain Lines*, 329 U.S. 424, 67 S. Ct. 435, 91 L. Ed. 396 (1947); *Alaska Airlines v. Civil Aeronautics Board*, 103 U.S. App. D.C. 225, 257 F.2d 229 (1958). We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency." (*Ibid.* 302 F.2d at page 880)

In fact, the procedure adopted by the Commission in the subject case is so extraordinary and novel that it would not even be available to the courts under the Federal Rules of Civil Procedure. Under the Federal Rules, no preliminary injunction shall be issued without notice to the adverse party. Notice implies a hearing. *Sims v. Greene*, 161 F.2d 87, 88-89 (3rd Cir. 1947). Even the comparatively limited remedy of a temporary restraining order must expire not later than ten days after entry (F.R.C.P. 65(b)(2)). The *ex parte* temporary restraining order, if granted, is only effective for a limited time — and a preliminary injunction will only be granted upon a hearing where both sides are present, affording the adverse party an opportunity to present evidence in his behalf. 7 *Moore's Federal Practice* Sec. 65.5.<sup>16</sup> By contrast, the relief

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<sup>16</sup> In the absence of express authority to grant preliminary stays, an administrative agency must resort to these Court procedures. Witness the practice of

granted by the Commission is subject to no time limitations, will likely extend substantially beyond a year's duration and was granted prior to a hearing. Yet the Commission tries to defend its order by arguing that it ". . . has not ordered petitioner permanently to cease and desist from any conduct. The Commission has required only a partial and temporary halt to the expansion of their systems pending a full hearing." (Motion of Respondents for Reconsideration of Stay Orders and Opposition to Motions for Stay, filed with this Court, August 13, 1966, Page 21.)

The Commission does not explain why an unlawful cease and desist order would become lawful if it were only temporary. But in any event, how temporary is it? Petitioner respectfully points out that the Order has no limit in time and could remain in effect for years and years.

The Commission emphasized the fact that the hearing was scheduled for September 27, 1966. But the hearing has already received its first postponement to December 6, 1966.

The hearing order sets nine specific issues, and a pending petition to enlarge the issues seeks to include a number of important related questions. Thus, it is to be expected that the hearing will deal with a plethora of questions which will involve engineering and economic studies and extensive research in the fields of audience measurement, marketing, advertising, network practices, economics of UHF broadcasting, station operation, and pay-TV, plus others.

After all the parties have completed their testimony and rebuttal testimony, there will be filings of proposed findings; there will be an

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the Federal Trade Commission where even in the case of false advertising of food, drugs, cosmetics and certain devices, the FTC must seek Court injunctions *Cf. Federal Trade Commission v. Dean Foods Co.*, \_\_\_ U.S. \_\_\_, 16 L.Ed.2d 802 (1966), 15 U.S.C. 45. Congress has rejected FTC efforts to secure authority to issue temporary injunctions. *House Report No. 9424 and Senate Report Nos. 3341 and 3424*, 84th Cong., 2d Sess. (1956); *House Report Nos. 49 and 1574*, 89th Cong., 1st Sess. (1965).

initial decision; and there will be subsequent filings of exceptions and requests for review at two levels within the Commission, plus petitions for reconsideration, and possible additional appeals to the Court.

On the basis of the Commission's work load and past precedents, it is conservative to estimate that the "temporary" relief would remain in effect for a period of 3 to 5 years or longer.

When pay-TV first appeared on the horizon the Commission was concerned with the question of whether pay-TV would have an adverse effect upon commercial television broadcasting, just as it is now concerned with CATV. It instituted a proceeding for the purpose of determining whether pay-TV broadcasting should be permitted and what safeguards would be needed to protect the existing broadcasting structure. Early this year the Commission invited additional comments to assist it in determining whether it should establish standards which would permit the use of over-the-air frequencies for pay-TV. It will be some years before this proceeding is concluded.<sup>17</sup>

In light of the nature of the administrative processes in general and the Commission's processes in particular, it borders on the fanciful to consider the Commission's action as "temporary". But even if such order can be construed as "temporary", it is manifest that the Commission's action is still in direct violation of the established law, as set forth above and succinctly summarized by Professor Louis L. Jaffe in his recent text as follows:

"Congress has granted to some agencies the power to issue orders effectively preserving the status quo, at least for a certain length of time, pending their own decisions. Absent such statutory grant, however, it does not appear that a Federal administrative agency can issue such orders, regardless of the harm which

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<sup>17</sup> The pay-TV proceeding began February 10, 1955.



may occur pending its decision or the possible inefficacy of orders it may enter after decision." (Jaffe, *Judicial Control of Administrative Action*, page 662 (1965).)

*F. Provisions of Section 4(i) of the  
Communications Act*

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The Commission endeavors to avoid the clear import and effect of controlling precedent by referring to Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), which reads as follows:

"The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."

This subsection is contained in the section entitled "Provisions Relating to the Commission," which section sets forth and deals with such matters as the number and salaries of the Commissioners; the location of the principal office; the employment of staff members; the fixing of payment of overtime to staff engineers; the making of expenditures for rent, office supplies, books, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides "The Commission shall have an official seal which shall be judicially noticed." 47 U.S.C. § 154(h).

It is perfectly plain that subsection 4(i) deals with rules and regulations necessary for the conduct of the Commission's business, and was never intended as a broad grant of power to adopt the extraordinary sanction involved herein.

To hold otherwise would raise serious questions of due process under the Fifth Amendment to the Constitution. The plain fact of the matter is that the Courts, as a matter of fundamental due process, will not permit restraint on a party's property rights without the prior hearing and particularly where freedom of speech may be affected adversely. A

*Quantity of Books v. Kansas*, 378 U.S. 205 (1964). In the cited case, the Supreme Court ruled that a seizure order against allegedly obscene books was constitutionally deficient in not first allowing the distributors of said books an adversary hearing. Surely, if a restraint against allegedly obscene books cannot be issued without prior hearing, then *a fortiori*, the Commission's flagrant attempt to restrict the carriage of television signals and the resultant diversified programs of entertainment, news, political broadcasts, and education materials must be dismissed. Even apart from fundamental First Amendment considerations, the property rights of Petitioners must be protected under elementary principles of due process as set forth in the Fifth Amendment.

### CONCLUSION

For the reasons specifically detailed in this Brief, Petitioner asks this Court to conclude that the Commission lacked statutory authority to issue a restraint of Petitioner's operations, without hearing. For all of the reasons set forth in this Brief and in the incorporated references to the Brief filed by Petitioners in Case No. 21,192, Petitioner prays that the Commission's Order be enjoined, set aside, superseded, annulled and reversed and that this Court provide such further relief as it may deem just and proper.

Respectfully submitted,

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## CERTIFICATE

We certify that, in connection with the preparation of this Brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing Brief is in full compliance with those rules.

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Arthur Scheiner

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Gilbert B. Lessenco



## APPENDIX

### STATUTES AND RULES INVOLVED

#### Communications Act of 1934, as amended, 47 U.S.C. § 151, et seq.

##### Provisions Relating to the Commission

**Section 4.** — (a) The Federal Communications Commission (in this Act referred to as the "Commission") shall be composed of seven commissioners appointed by the President, by and with the advice and consent of the Senate, one of whom the President shall designate as chairman.

(b) Each member of the Commission shall be a citizen of the United States. No member of the Commission or person in its employ shall be financially interested in the manufacture or sale of radio apparatus or of apparatus for wire or radio communication; in communication by wire or radio or in radio transmission of energy; in any company furnishing services or such apparatus to any company engaged in communication by wire or radio or to any company manufacturing or selling apparatus used for communication by wire or radio; or in any company owning stocks, bonds, or other securities of any such company; nor be in the employ of or hold any official relation to any person subject to any of the provisions of this Act, nor own stocks, bonds, or other securities of any such company; nor be in the employ of or hold any official relation to any person subject to any of the provisions of this Act, nor own stocks, bonds or other securities of any corporation subject to any of the provisions of this Act. Such Commissioners shall not engage in any other business, vocation, profession or employment. Any such Commissioner serving as such after one year from the date of enactment of the Communications Act Amendments, 1952, shall not for a period of one year following the termination of his services as a Commissioner represent any person before the Commission in a pro-

fessional capacity, except that this restriction shall not apply to any Commissioner who has served the full term for which he was appointed. Not more than four members of the Commission shall be members of the same political party.

(c) The Commissioners first appointed under this Act shall continue in office for the terms of one, two, three, four, five, six and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years and until their successors are appointed and have qualified, except that they shall not continue to serve beyond the expiration of the next session of Congress subsequent to the expiration of said fixed term of office; except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he succeeds. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

(d) Each Commissioner shall receive an annual salary of \$10,000, payable in monthly installments.

(e) The principal office of the Commission shall be in the District of Columbia, where its general sessions shall be held, but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States.

(f) (1) The Commissioner shall have authority, subject to the provisions of the civil-service laws and the Classification Act of 1949, as amended, to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other employees as are necessary in the exercise of its functions.

(2) Without regard to the civil-service laws, but subject to the Classification Act of 1949, each Commissioner may appoint a legal as-

sistant, an engineering assistant, and a secretary, each of whom shall perform such duties as such Commissioner shall direct. In addition, the chairman of the Commission may appoint, without regard to the civil-service laws, but subject to the Classification Act of 1949, an administrative assistant who shall perform such duties as the chairman shall direct.

(3) The Commission shall fix a reasonable rate of extra compensation for overtime services of engineers in charge and radio engineers of the Field Engineering and Monitoring Bureau of the Federal Communications Commission, who may be required to remain on duty between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian or on Sundays or holidays to perform services in connection with the inspection of ship radio equipment and apparatus for the purposes of Part II of Title III of this Act or the Great Lakes agreement, on the basis of one-half day's additional pay for each 2 hours or fraction thereof of at least 1 hour that the overtime exceeds beyond 5 o'clock postmeridian (but not to exceed 2-1/2 days' pay for the full period from 5 o'clock postmeridian to 8 o'clock antemeridian) and 2 additional days' pay for Sunday or holiday duty. The said extra compensation for overtime services shall be paid by the master, owner, or agent of such vessel to the local United States collector of customs or his representative, who shall deposit such collection into the Treasury of the United States to an appropriately designated receipt account: Provided, that the amounts of such collections received by the said collector of customs or his representative shall be covered into the Treasury as miscellaneous receipts; and the payments of such extra compensation to the several employees entitled thereto shall be made from the annual appropriations for salaries and expenses of the Commission: Provided further, that to the extent that the annual appropriations which are hereby authorized to be made from the general fund of the Treasury are insufficient, there are hereby authorized to be appropriated from the general fund of



the Treasury such additional amounts as may be necessary to the extent that the amounts of such receipts are in excess of the amounts appropriated: Provided, further, that such extra compensation shall be paid if such field employees have been ordered to report for duty and have so reported whether the actual inspection of the radio equipment or apparatus takes place or not: and provided further, that in those ports where customary working hours are other than those hereinabove mentioned, the Engineers in Charge are vested with authority to regulate the hours of such employees so as to agree with prevailing working hours in said ports where inspections are to be made, but nothing contained in this proviso shall be construed in any manner to alter the length of a working day for the engineers in charge and radio engineers or the overtime pay herein fixed.

(g) The Commission may make such expenditures (including expenditures for rent and personal services at the seat of government and elsewhere, for office supplies, law books, periodicals, and books of reference, for printing and binding, for land for use as sites for radio monitoring stations and related facilities, including living quarters where necessary in remote areas, for the construction of such stations and facilities, and for the improvement, furnishing, equipping and repairing of such stations and facilities and of laboratories and other related facilities (including construction of minor subsidiary buildings and structures not exceeding \$25,000 in any one instance) used in connection with technical research activities), as may be necessary for the execution of the functions vested in the Commission and as from time to time may be appropriated for by Congress. All expenditures of the Commission, including all necessary expenses for transportation incurred by the Commissioners or by their employees, under their orders, in making any investigation or upon any official business in any other places than in the city of Washington, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chair-

man of the Commission or by such other members or officer thereof as may be designated by the Commission for that purpose.

(h) Four members of the Commission shall constitute a quorum thereof. The Commission shall have an official seal which shall be judicially noticed.

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No Commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.

(k) The Commission shall make an annual report to Congress, copies of which shall be distributed as are other reports transmitted to Congress. Such report shall contain — (1) Such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy;

(2) Such information and data concerning the functioning of the Commission as will be of value to Congress in appraising the amount and character of the work and accomplishments of the Commission and the adequacy of its staff and equipment; provided, that the first and second annual reports following the date of enactment of the Communications Act Amendments, 1952, shall set forth in detail the number and

caption of pending applications requesting approval of transfer of control or assignment of a broadcasting station license, or construction permits for new broadcasting stations, or for increases in power, or for changes of frequency of existing broadcasting stations at the beginning and end of the period covered by such reports;

(3) [Repealed].

(4) An itemized statement of all funds expended during the preceding year by the Commission, of the sources of such funds, and of the authority in this Act or elsewhere under which such expenditures were made; and

(5) Specific recommendations to Congress as to additional legislation which the Commission deems necessary or desirable, including all legislative proposals submitted for approval to the Director of the Bureau of the Budget.

(1) All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier or licensee that may have been complained of.

(m) The Commission shall provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several states without any further proof or authentication thereof.

(n) Rates of compensation of persons appointed under this section shall be subject to the reduction applicable to officers and employees of the federal government generally.

(o) For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life



and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and co-ordination of these systems.

**Section 303(m)**

(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee —

(A) Has violated any provision of any Act, treaty or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) Has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) Has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) Has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language or meaning, or has knowingly transmitted —

(1) False or deceptive signals or communications, or

(2) A call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) Has willfully or maliciously interfered with any other radio communications or signals; or

(F) Has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for

the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

## Section 312

— (a) The Commission may revoke any station license or construction permit —

(1) for false statements knowingly made either in the application or in any statement of fact which may be required pursuant to Section 308;

(2) because of conditions coming to the attention of the Commission which would warrant it in refusing to grant a license or permit on an original application;

(3) for willful or repeated failure to operate substantially as set forth in the license;

(4) for willful or repeated violation of, or willful or repeated failure to observe, any provision of this Act or any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States;

(5) for violation of or failure to observe any final cease and desist order issued by the Commission under this section; or

(6) for violation of Section 1304, 1343, or 1464 of Title 18 of the United States Code.

(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or Section 1304, 1343, or 1464 of Title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

(c) Before revoking a license or permit pursuant to subsection (a), or issuing a cease and desist order pursuant to subsection (b), the Commission shall serve upon the licensee, permittee or person involved an order to show cause why an order of revocation or a cease and desist order should not be issued. Any such order to show cause shall contain a statement of the matters with respect to which the Commission is inquiring and shall call upon said licensee, permittee or person to appear before the Commission at a time and place stated in the order, but in no event less than thirty days after the receipt of such order, and give evidence upon the matter specified therein; except that where safety of life or property is involved, the Commission may provide in the order for a shorter period. If after hearing, or a waiver thereof, the Commission determines that an order of revocation or a cease and desist order should issue, it shall issue such order, which shall include a statement of the findings of the Commission and the grounds and reasons therefor, and specify the effective date of the order, and shall cause the same to be served on said licensee, permittee, or person.

(d) In any case where a hearing is conducted pursuant to the provisions of this section, both the burden of proceeding with the intro-



duction of evidence and the burden of proof shall be upon the Commission.

(e) The provisions of § 9(b) of the Administrative Procedure Act which apply with respect to the institution of any proceeding for the revocation of a license or permit shall apply also with respect to the institution, under this section, of any proceeding for the issuance of a cease and desist order.

**F.C.C. Reg. § 74.1107, 31 Fed. Reg. 4572 (1966)**

Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will

be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966 to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966 a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking in-

to account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. The Commission may also consider, upon the basis for the pleadings before it, whether temporary relief is called for in the public interest and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

**F.C.C. Reg. § 74.1109, 31 Fed. Reg. 4572 (1966)**

Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be sup-



ported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief.

Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

BRIEF FOR PETITIONERS MISSION CABLE TV, INC., PACIFIC  
VIDEO CABLE CO., and TRANS-VIDEO CORP.

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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Case No. 21183

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SOUTHWESTERN CABLE CO.,  
*Petitioner,*

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
*Respondents.*

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Case No. 21192

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MISSION CABLE TV, INC.,  
PACIFIC VIDEO CABLE CO.,  
and  
TRANS-VIDEO CORP.,  
*Petitioners,*

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
*Respondents.*

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ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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Case No. 21183

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SOUTHWESTERN CABLE CO.,  
*Petitioner,*

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
*Respondents.*

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Case No. 21192

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MISSION CABLE TV, INC.,  
PACIFIC VIDEO CABLE CO.,  
and  
TRANS-VIDEO CORP.,  
*Petitioners,*

v.

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,  
*Respondents.*

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ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR PETITIONERS MISSION CABLE TV, INC., PACIFIC  
VIDEO CABLE CO., and TRANS-VIDEO CORP.





## JURISDICTIONAL STATEMENT

The petition for review was filed under the provisions of Section 402 (a) of The Communications Act of 1934, as amended, 66 STAT. 718 (1952), 47 U.S.C.A. § 402(a) (1962) and under Sections 2 and 3 of the Judicial Review Act of 1950, 64 STAT. 1129, 1130 (1950), 5 U.S.C.A. §§ 1032, 1033 (Supp. 1961). Review is sought of the Memorandum Opinion and Order of the Federal Communications Commission, released July 25, 1966, identified as FCC 66-683 and Docket No. 16786 and as corrected on July 26, 1966. *Midwest Television, Inc. (KFMB-TV)*, 4 F.C.C.2d 612 (1966). (R. 577-598). <sup>1</sup>

Petitioners, Mission Cable TV, Inc. and Pacific Video Cable Co., are California corporations, doing business in California with their principal offices located in El Cajon, California. Trans-Video Corp. is a Delaware corporation, doing business in California with its principal offices located in El Cajon, California. Petitioners are persons aggrieved within the meaning of Section 4 of the Judicial Review Act of 1950, since the order of the Commission is a final order prohibiting them from conducting their business for an undetermined period of time, within certain areas of the City of San Diego, California, and the County of San Diego, California, where they otherwise are authorized and legally empowered to do so. Venue of this proceeding is placed in the United States Court of Appeals for the Ninth Circuit by Section 3 of the Judicial Review Act of 1950, 5 U.S.C.A. § 1033 (Supp. 1961).

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<sup>1</sup> References are to the page number of the Record as certified to this Court by the Commission under date of August 26, 1966.

## STATEMENT OF THE CASE

Petitioners, Mission Cable TV, Inc., and Pacific Video Cable Co., are the owners of community antenna television systems (CATV) <sup>2</sup> in the San Diego, California, area. Petitioner, Trans-Video Corp., is the majority owner of Mission Cable TV, Inc., and the sole owner of Pacific Video Cable Co. In addition, Trans-Video Corp. is the operator of the systems owned by Mission and Pacific. Mission and Pacific began operating prior to February 15, 1966, under authority of franchises issued by the Cities of San Diego, Chula Vista, La Mesa, El Cajon and the County of San Diego.

On April 23, 1965, the Commission issued its First Report and Order in Dockets No. 14895 and 15233 (30 F.R. 6038; 38 F.C.C. 683; 4 Pike & Fischer, R.R.2d 1725) in which it adopted rules covering the operations of common-carrier microwave stations to relay signals to CATV systems. These rules, in reality, apply to and control the operation of CATV systems which <sup>3</sup> receive signals via microwave. At the same time, the Commission issued a Notice of Inquiry and Proposed Rule-Making in Docket No. 15971 (30 F.R. 6078; 4 Pike & Fischer, R.R.2d 1679) concerning the adoption of rules to control the operation of all CATV systems.

On February 15, 1966, the Commission issued a press release announcing that it planned to adopt new rules to regulate all CATV systems. These rules were not adopted until March 4, 1966, and not released to the public until March 8, 1966. They were published in the

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<sup>2</sup> A CATV system is an enterprise which receives television signals transmitted by television broadcast stations (either directly off-the-air or by means of a radio microwave relay), amplifies these signals and distributes them through a system of cables to subscribers who pay a charge for this service. In this case, Petitioners' systems use off-the-air pickups only.

<sup>3</sup> See, *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), *cert. denied*, 375 U.S. 951 (1963).

Federal Register on March 17, 1966, as the Second Report and Order in Dockets 14895, 15233 and 15791 (31 F.R. 4540; 2 F.C.C.2d 725; 6 Pike & Fischer, R.R.2d 1717). In the Second Report and Order, the Commission for the first time adopted rules to regulate CATV systems which received signals directly off-the-air from television broadcast stations. In essence, the new rules are purportedly designed to protect and foster the development of local UHF television broadcast service. The Commission was concerned that the increased variety of signals available on CATV systems might reduce the available audience and revenues for local television broadcast stations by "fragmentation" of audience. To prevent this purported evil, the new rules provide that CATV systems must carry local stations and nearby stations in accordance with a system of priorities based upon signal strength. They also provide that a local television station may prevent the CATV system from carrying on the same day the signal of a non-local station which duplicates the programs of the local station. In addition, the new rules provide that no CATV system in the top 100 markets, as defined by ARB,<sup>4</sup> may extend any "distant signal" beyond the Grade B contour of the originating station without Commission approval after a hearing. Finally, the rules provide that the Commission may impose other limitations upon CATV systems if required to protect the "public interest."

The rule prohibiting carriage of distant signals was made effective on February 15, 1966 (the date of a press release), despite the fact that these rules were not adopted until March 4, 1966, were not released to the public until March 8, 1966, and were not published in the Federal Register until March 17, 1966. CATV systems in operation and delivering distant signals on February 15, 1966, were accorded

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<sup>4</sup> The American Research Bureau is a private organization engaged in the business of producing and selling television market data and research surveys concerning television viewing habits.



"grandfather" rights and were permitted to continue carriage of distant signals.

On March 17, 1966, Midwest Television, Inc., licensee of VHF television Station KFMB-TV, San Diego, California, filed a "Petition for Immediate Temporary and or Permanent Relief Against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations into the San Diego Area," naming Petitioners, among others, as respondents. (R. 1) A supplement to the petition was filed on April 4, 1966. (R. 121)

On April 7, 1966, Petitioners filed a "Petition for Reconsideration" of the Commission's Second Report and Order in Docket No. 15971, which petition is still pending before the Commission. On April 18, 1966, Petitioners filed an opposition to the Midwest petitions. (R. 194). Midwest, in turn, filed a reply on April 25, 1966, to the Opposition to the Motion for Temporary Relief (R. 404) and on May 3, 1966, filed a reply to the Opposition for Permanent Relief. (R. 506) Various pleadings were filed by other respondents in the proceeding.

On May 31, 1966, Petitioners filed a "Supplement to 'Opposition to Petition and Supplement to Petition for Immediate Temporary and for Permanent Relief Against Extensions of Service of CATV Systems Carrying Signals of Los Angeles Stations into the San Diego Area'." This petition contained an exhibit in another case (Docket No. 16575) which showed that, according to the testimony of the expert witness of the Commission, the Grade B contours of all the Los Angeles VHF stations fell within the city limits of San Diego. On June 3, 1966, the Commission returned the pleading with a letter advising that the Commission would take official notice of the matter. However, the Memorandum Opinion and Order failed to mention this evidence submitted by its own experts, but erroneously stated that there was doubt as to the location of the Grade B contours of the Los Angeles stations. (Para. 18; R. 588).

On July 25, 1966, the Commission issued the Memorandum Opinion and Order which this Court is requested to review. (R. 577). In it the Commission concedes that Petitioners' CATV systems are not operating in violation of any of the new CATV rules. It then concluded that, in accordance with the statement in the Second Report and Order, the San Diego situation is a special case which the Commission will investigate and consider on an ad hoc basis to determine if any *new and additional* requirement or limitation should be placed upon CATV systems operating under these circumstances. (Para. 19; R. 588-589) It then designated the matter for hearing in an adversary proceeding on a series of broad issues which, in fact, constitute a further rule-making proceeding, to determine the extent of CATV penetration in San Diego, and the effect of CATV operations on local television stations in that market. The issues are as follows: (R. 593-594).

- "1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of subscribers per half mile (or other comparable convenient unit of measure) of cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.
- "2. To determine whether the signals of any of the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.
- "3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.
- "4. To determine the present penetration of CATV service by CATV systems in the San Diego market

area and the potential penetration of CATV service under conditions of unlimited expansion.

- "5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.
- "6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.
- "7. To determine whether any conditions of future import should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.
- "8. To determine whether expansion of any of Respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.
- "9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission."

The Commission then went on to determine the nature of the temporary relief to be afforded to Midwest Television, Inc. It ruled that pending final disposition of this proceeding, it would order Mission to confine delivery ". . . of the Los Angeles signals carried on its systems to subscribers within those areas where Mission . . . was operating on February 15, 1966." In addition, it ruled that Mission could continue its present service to persons who began receiving service and to those who signed subscription requests between the date of February 15, 1966, and the date of the Order. The Commission pointed out that Peti-



tioners could continue to construct lines and add new subscribers within these franchised areas ". . . so long as the expansion is confined to the carriage of the San Diego-Tijuana signals." (Emphasis supplied) (Para. 26; R. 591) This language clearly demonstrates that the stay is in stark reality a final government sanction prohibiting the dissemination of certain television programs to the public of the San Diego area, for an indefinite period of time.<sup>5</sup>

On August 8, 1966, Petitioner, Southwestern Cable Co. filed a Petition For Review and an Application For Interlocutory Injunction. On August 10, 1966, Petitioners Mission Cable TV, Inc., Pacific Video Cable Co. and Trans-Video Corp. filed a Petition For Review and a Petition For Stay Pendente Lite. After hearing, the Court on August 23, 1966, issued a partial stay of the Commission's order, allowing Petitioners to add new subscribers to their trunk and feeder lines in existence on August 23, 1966.

### SPECIFICATIONS OF ERROR

1. The issuance of a stay restraining Petitioners from continuing their legal business within their franchised areas is unlawful, since the Commission is without statutory authority to issue such an order without a hearing.

2. The issuance of a temporary stay is arbitrary and capricious, since it is not based on valid findings that logically support the conclusions that the public and Midwest would suffer irreparable injury.

3. The issuance of a stay and the designation of this proceeding

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<sup>5</sup> Adversary proceedings of this nature may take years to resolve. One case of a somewhat similar nature has been in litigation before the Commission and the Courts for over twenty years. See, *American Broadcasting-Paramount Theatres, Inc. v. Federal Communications Commission*, 345 F.2d 954 (U.S. App.D.C 1965), *cert. denied*, 383 U.S. 906 (1966).

for a hearing is unlawful and improper, since the Commission lacks the statutory authority to control and license CATV systems which are not common carriers and which do not engage in the transmission of energy or communication or signals by radio but rather only receive television signals off-the-air and carry these signals by wire to subscribers.

4. The issuance of a stay prohibiting Petitioners from carrying the signals of Los Angeles television stations and the provisions of the Commission's CATV rules, which limit the right of CATV systems to carry signals of their own choice, constitute an unreasonable and unwarranted prior restraint on freedom of speech and violate the First Amendment of the Constitution of the United States.

5. The issuance of a stay and the designation of the proceeding for hearing under the provisions of Section 74.1109 are unlawful and improper, since this section of the CATV rules is void for failure of the Commission to comply with the provisions of Section 4 of the Administrative Procedure Act.

## SUMMARY OF ARGUMENT

In Point II, Petitioners urge that the issuance of the stay order is arbitrary and capricious, since the Commission failed to make the necessary findings of basic facts from which it could logically be inferred that the continued expansion of Petitioners' lawful business would cause irreparable injury to the public or to Midwest Television, Inc. An analysis of the Commission's Memorandum Opinion and Order clearly shows that the findings of basic fact were limited to speculative and irrelevant facts which in no way support the conclusion that the public interest required the issuance of a stay order.

In Point III, Petitioners explain the Federal Communications Commission's lack of statutory authority to regulate and control CATV sys-

tems in the manner contemplated by its present rules and the stay order in this proceeding. The Commission's authority is precisely defined and clearly limited by the Communications Act of 1934, as amended, and unless Title II or Title III of that Act provides the necessary authority, it does not exist. The Commission has conceded that CATV systems should not be regulated as common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F.2d 282 (U.S. App. D.C. 1966). On the other hand, except for special and specific statutory authorizations, all of the provisions of Title III of the Communications Act have to do with, or are related to, the licensing of radio stations. Thus, insofar as non-common carrier communication functions are concerned, the Commission (unless otherwise *specifically* authorized by statute) is authorized only to license radio stations, and its rule making activities must be related to and based on this licensing authority. See, *Regents of Georgia v. Carroll*, 338 U.S. 568, 94 L. Ed. 363 (1950). While Section 2(a) of the Communications Act applies ". . . to all interstate . . . communication by wire or radio . . .", this has no bearing on the Commission's authority to regulate CATV systems, even though such systems are determined to be "interstate communication," since none of the Act's provisions cover such systems. CATV systems do not require licenses within the meaning of Title III of the Communications Act, and they are not common carriers within the meaning of Title II. Accordingly, any rules adopted by the Commission looking to the regulation of such systems are inconsistent with the Act and, therefore, unlawful.

In Point IV, Petitioners contend that the Commission's stay, which prohibits their CATV system from carrying the signals of Los Angeles television stations in San Diego, is an unreasonable prior restraint upon freedom of speech which violates the freedom guaranteed by the First Amendment. There can be no question that the prior restraint has oc-



curred. The issues are whether or not a CATV system and the public are protected by the provisions of the First Amendment and whether the restraint is reasonable in light of public interest considerations which the Federal Communications Commission may lawfully consider. It is clear that a restraint on the right of a CATV system to carry the Los Angeles television signals cannot be justified by a scarcity of broadcast frequencies which factor has been the basis for the Court's approval of Commission actions placing limitations on the freedom of speech of broadcast licenses. The fact is that the prior restraint in the instant case has been imposed because of the Commission's speculation that the continued carriage of the signals of the Los Angeles stations would threaten the viability of the San Diego television stations. Such a speculative reason does not justify the direct prior restraint of freedom of speech imposed here on both Petitioners and the public of San Diego. In addition, the Commission, in seeking to eliminate economic competition to television stations in San Diego, has exceeded its statutory authority, and, therefore, such economic protection cannot be a justification for restraints on freedom of speech which are prohibited by the First Amendment.

In Point V, Petitioners argue that the adoption of Section 74.1109 of the Commission's Rules, the basis of the stay order challenged herein, is arbitrary and capricious, since no notice was given of the proposed adoption of the rule as required by Section 4 of the Administrative Procedure Act. In the Notice of Inquiry, the Commission indicated it intended to adopt interim rules to control off-the-air CATV systems which rules would be similar to the existing rules controlling microwave-fed CATV systems. The Commission specifically stated that a further notice of proposed rule-making would be issued prior to the adoption of the rules. Nowhere in the Notice of Inquiry were Petitioners placed on notice that the Commission intended to adopt a rule conferring new powers to issue injunctive relief against non-licenses,

without a hearing, and, by an *ad hoc* proceeding, to impose further and different requirements on CATV systems over and above the provisions of the other CATV rules.

## ARGUMENT

### I

#### **The Commission Lacks the Statutory Authority To Issue a Stay Without a Hearing**

Petitioners, Mission Cable TV, Inc., Pacific Video Cable Co., Inc., and Trans-Video Corp. submit that the Commission lacks the statutory authority to stay, without a hearing, the legitimate operation of their business. In this regard, Petitioners rely upon and incorporate by reference the argument of Southwestern Cable Co., contained in its brief filed in this proceeding.

### II

#### **The Issuance of the Temporary Stay Is Arbitrary and Capricious Since It Is Not Supported by Valid Findings**

The Commission has not, prior to adoption of Section 74.1109 of its rules, attempted to use injunctive power in connection with the activities of non-licensees. To the extent that the Commission has issued stay orders in the past, they have always been directed at a matter clearly within its control and jurisdiction, i.e., an earlier order of the Commission. (See, Section 1.106(n) of the Commission's Rules and Regulations).

The Commission, in the instant case, has issued an order which, in the language of Section 74.1109, is denominated as "temporary relief", although it is effectively a stay order curbing Petitioners' lawful activities for an indefinite period of time. For this order to be validly issued,

the Commission must make findings of "basic facts", from which the ". . . ultimate facts in the terms of the statutory criterion are inferred." *Saginaw Broadcasting Co. v. Federal Communications Commission*, 68 App. D.C. 282, 288, 96 F.2d 554, 560 (1938). In the *Saginaw* case the Court set out the four part process the Commission must follow in making the necessary findings of fact to support an order:

"(1) evidence must be taken and weighed, both as to its accuracy and credibility; (2) from attentive consideration of this evidence a determination of facts of a basic or underlying nature must be reached; (3) from these basic facts the ultimate facts, usually in the language of the statute, are to be inferred, or not, as the case may be; (4) from this finding the decision will follow by application of the statutory criterion." *Supra* at 287, 96 F.2d at 559.

These basic findings of fact are necessary so that a court may properly exercise its review function. They must ". . . represent the determination of the administrative body as to the meaning of the evidence," and the ultimate facts must flow from these basic findings. *Saginaw supra* at 289, 96 F.2d at 561. In *Johnston Broadcasting Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 40, 46, 175 F.2d 351, 357 (1949), the Court reaffirmed the Commission's obligation to make, from the evidence before it, basic findings of fact from which ultimate facts may be found by logical inference.

The Commission, itself, has set up certain standards for the granting of stays under Section 1.106(n) of its Rules, which standards constitute the elements of the statutory criterion of "public interest". The Commission, in denying a petition for stay pending reconsideration of an order granting a construction permit, enunciated these standards as follows:

"It further appearing, that the petitioner has failed to demonstrate factually that unless a stay is issued the



public (or its own interest) will suffer irreparable injury; that its allegation that Xenia's sole outlet, an FM station, will not survive in competition with a standard broadcast station in Xenia and that no other FM station will be assigned to that city are speculative; that as to its allegations that Greene County [Greene County Radio, the permit holder] is already making commitments with regard to construction of the station, the Commission has consistently rejected the contention that the expenditures of funds by a grantee and the construction of a station is so prejudicial as to require a stay because if petitioner is eventually successful in its request for reconsideration, the grantee's authorization would, of course, be nullified and any funds expended by it would be lost;" *Speidel Broadcasting Corp. of Ohio*, 1 Pike and Fischer, R.R.2d 355, 356 (1963).

The Commission's standards for granting of a stay, set out in *Speidel Broadcasting Corp.*, *supra*, are similar to court enunciated requirements for the issuance of a stay. See, *Hamlin Testing Laboratories, Inc. v. United States Atomic Energy Commission*, 337 F.2d 221 (C.C.A.6th, 1964); *Associated Securities Corp. v. Securities and Exchange Commission*, 283 F.2d 773 (C.C.A. 10th, 1960); *Eastern Airlines v. Civil Aeronautics Board*, 261 F.2d 830 (C.C.A.2d, 1958); and *Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission*, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958).

It is submitted that the Commission has completely failed to make the necessary findings of fact to support the ultimate finding that the public interest requires the issuance of a temporary stay. The only findings of basic facts in the Commission's opinion appear in paragraphs 16, 17, 19 and 23, thereof. These findings, concisely restated, are that (1) there is one operating UHF station in San Diego, one outstanding construction permit for a UHF station, and one application for an educational UHF station; (2) several of Petitioners' CATV systems

commenced operations two to four months prior to the filing of Midwest Television, Inc.'s petition herein; (3) there are 380,000 housing units in San Diego County; (4) on February 15, 1966, there were approximately 17,000 CATV subscribers in San Diego County within KFMB-TV's Grade A contour (6,500 in the City of San Diego); (5) 17,000 homes constitute 4.6% of the housing units in San Diego County within KFMB-TV's Grade A contour; (6) there are approximately 294,000 homes within this contour in which CATV systems carrying Los Angeles signals have begun to operate; (7) this represents 78% of all San Diego County homes within KFMB-TV's Grade A contour; (8) approximately 90% of all homes in the county within the Grade A contour of KFMB-TV are located in areas covered by CATV franchises; (9) approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed; (10) the Los Angeles stations are located more than 100 miles from the San Diego main post office; and (11) there were discrete non-contiguous areas in which Petitioners' CATV systems operated as of February 15, 1966. (R. 587-589, 591) The Commission's opinion also sets forth certain allegations made by the various parties, but does not make findings of basic facts other than as outlined above.

Based upon these findings of basic fact, the Commission had to conclude that the following ultimate facts logically followed in order to issue a valid stay order: First, the continued expansion of Petitioners' CATV system will endanger the viability of San Diego television stations and thus cause irreparable injury to the public; second, that the same expansion will cause irreparable injury to Midwest Video, (KFMB-TV); and third, that the stay will not cause irreparable injury to Petitioners.

It is clear that there is no logical relationship between the findings of fact which were made and the findings of ultimate facts that should have been made. Thus, there are no findings which would allow the

Commission to conclude that the public interest standards, justifying the issuance of a stay, exist in this case. The findings of fact reveal nothing but speculation and irrelevant facts. The logical inference, required by law, is completely missing. The fact is that the Commission did not know on July 25, 1966, and does not know today, whether irreparable injury would result to the public interest if a stay were not issued. It is submitted that the issuance of the temporary stay, unsupported by the necessary findings of basic fact, is clearly an arbitrary and capricious action and must be set aside.

### III

#### **The Federal Communications Commission Lacks Statutory Jurisdiction To Regulate CATV Systems**

If the Commission lacks the statutory authority to control, license, or otherwise regulate community antenna television systems, it is clear that its Order staying Petitioners' business operations, pending the hearing contemplated by the July 25, 1966, Memorandum Opinion and Order, is also unlawful and must be set aside by this Court. For this reason, an analysis of the pertinent sections of the Communications Act of 1934, as amended, is required. 66 STAT. 1064 *et seq.*, 47 U.S.C.A. § 151 *et seq.*, (1962).<sup>6</sup>

Under the Communications Act the Commission has two principal and separate functions. On the one hand, it is a regulator of a public utility type of activity (Title II), and, on the other, it is an agency that licenses radio stations (Title III). Here we need be concerned only with the latter, for the Commission has held that CATV systems are not

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<sup>6</sup> In the paragraphs that follow, references to Sections of the Communications Act are not specifically related to the United States Code. It should be noted, however, that Sections 1 through 4 of the Act are Sections 151 through 154 of the Code and all other Sections are identically numbered in both the Act and the Code.



common carriers within the meaning of Title II of the Act. See, *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, 359 F.2d 282 (U.S. App. D.C. 1966).

Somewhat inconsistently, however, the Commission claims to have the required authority to adopt the CATV rules, and thus to determine whether and to what extent citizens of this country may engage in the perfectly legal business of operating a CATV system, because Section 2(a) of the Communications Act provides that the provisions of the Act ". . . shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio . . .". The simple fact of the matter is, however, that there are no *provisions of the Act* that even remotely purport to have anything to do with the control and regulation of wired communication systems that are not common carriers within the meaning of Title II of the Act.

No study or analysis of the legislative history of the Communications Act of 1934, however twisted or tortured, can lead to a conclusion that the Congress, when it adopted the Act, intended anything other than to place the responsibility for administering two separate and distinct statutory laws under one governing body — the Federal Communications Commission. True, those laws — the Interstate Commerce Act, insofar as it pertained to common carrier communications by telegraph, telephone and cable companies, and the Federal Radio Act — were amended in the process, but there were no amendments which contemplated new areas of jurisdiction and responsibility for the Federal Government.

Thus, as the Senate Committee explained in its report on the then proposed Communications Act of 1934, the legislation contains ". . . many provisions . . . copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business . . .". The Report also points out that, while in some paragraphs the language is changed, the ". . . variances or

departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of Congressional intent to attempt a different objective." S. R. No. 781, 73d Cong. 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:221, 10:222).<sup>7</sup>

Legislative history thus establishes that the primary purpose of the Communications Act of 1934 was simply to provide for the regulation of common carriers and for the licensing of radio stations by the

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<sup>7</sup> The House also made it clear that no changes in the substance of previous legislation were contemplated by the Communications Act of 1934. Its Report explained the new legislation as follows:

"The communications industry has been subject to disjointed regulation by several different agencies of the Government. The Interstate Commerce Commission has had jurisdiction over common carriers engaged in communication by wire or wireless since 1910, but has never set up any bureau within its organization designed to concentrate on this field. The Radio Commission has had jurisdiction since 1927 over the licensing of radio stations . . . .

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"It is important to review the legislative history of the regulation of communications by the Interstate Commerce Commission. That body functions under an Act of 1887 which has been many times amended. It was originally created to regulate railroads and still is primarily concerned with the transportation field, but in 1910 an amendment to the Interstate Commerce Act made common carriers engaged in the transmission of intelligence by wire or wireless subject to its jurisdiction. While a series of minor amendments has followed this 1910 legislation the Act never has been perfected to encompass adequate regulation of communications but has really been an adoption of railroad regulation to the communications field. As a consequence, there are many inconsistencies in the demands of the Act and also many important gaps which hinder effective regulation. In this bill the attempt has been made to preserve the value of Court and Commission interpretation of that Act, but at the same time modifying the provisions so as to provide adequately for the regulation of communications' common carriers." H. Rep. No. 1850, 73d Cong. 2d Sess. (1934). (1 Pike & Fischer, R.R. 10:243-10:244).



same agency. Congress did not intend — and the Act does not essay — to create new areas of federally regulated activity.

Moreover, the new Act made no changes of substance with respect to the Federal Government's responsibility in the radio field. While the Commission can and does exercise some measure of control over the operations and activities of the radio stations it licenses, such control stems from the licensing function, and the basis for control and regulation is the license. The statutory prohibition as provided in Section 301 of the Act is simply that the use or operation of any apparatus *for the transmission of energy or communications or signals by radio* is unlawful unless such use or operation is first licensed by the Commission. Absent such a license, a user or operator of radio apparatus is subject to fine and imprisonment.

Title III of the Act is entitled "Provisions Relating to Radio" and each and every Section of Title III in fact does relate to radio. Furthermore, with a few exceptions, i.e., Section 303(s), all of the provisions of Title III relate only to the radio *transmission* function. Title III of the Act does not purport to be concerned with *the reception* of radio signals and until the adoption of the rules at issue here the Commission has never asserted that reception of radio signals or dissemination of information by wire (except by a carrier subject to regulation under Title II of the Act) was any of its business or concern.

The Act has not been changed and a radio station, the apparatus with which the Commission is concerned, is still only a station "equipped to engage in *radio* communication or *radio* transmission of energy." A CATV system is not equipped to engage in *radio* communication or *radio* transmission of energy. It is equipped only to engage in "wire communication" and, therefore, subject to regulation only if it functions as a common carrier within the meaning of Title II of the Act.

In asserting that it does have jurisdiction over CATV systems, the

Commission relies only on the general rule making authority granted it by such Sections as 4(i) and 303(f) and (r) which, says the Commission, ". . . includes authority to take necessary action, not inconsistent with the Act or law, to prevent frustration of Section 307(b) by CATV — and 'interstate communication by wire' to which the Act's provisions are applicable (Sections 2(a) and 3(a))." See, *Second Report and Order, Dockets* 14895, 15233 and 15791, 31 F.R. 4540, 4541; 2 F.C.C. 725; 6 Pike & Fisher, R.R. 2d 1717, 1727 (1966).

This statement, however, begs the question. Petitioners concede that the Commission has, and must have, authority to adopt rules and take actions "not inconsistent with the Act or law." The key, however, is that its rules and actions *must be consistent with the Act or law* and the particular question for decision is whether the CATV rules and the actions complained of in this appeal are consistent with the authority granted the Commission by law, i.e., by the Communications Act of 1934, as amended.

As the Supreme Court has explained with respect to the extent of the Commission's authority under the so-called general rule-making provisions of the Act, such Sections as 303(r) must be interpreted and applied in connection with the Commission's power to license radio stations. *Regents of Georgia v. Carroll*, 338 U.S. 568, 600, 94 L. Ed. 363, 374 (1950).<sup>8</sup> Only when so limited and related are rules and actions of the Federal Communications Commission valid and lawful.

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<sup>8</sup> In *Regents of Georgia v. Carroll*, *supra* at 597-599, 94 L. Ed. at 373-374, the Supreme Court also stated as follows (footnotes omitted):

" . . . As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. When to assert its undoubted power to regulate radio channels, Congress set up the Federal Communications Commission, it prescribed licensing as the method of regulation. 47 USCA § 307, FCA title 47, § 307. In its action on licenses, the Commission is to be guided by what we have called the 'touchstone' of 'public convenience, interest, or necessity.' Since the

The Commission is not relying on its licensing power in support of its CATV rules and actions, and there are no other powers provided by law on which to rely. In particular, there are no provisions in the Communications Act having to do with the regulation of wired communications systems other than those governing common carriers. Otherwise, insofar as material here, the Commission's authority — and all pertinent provisions of the Act — have to do with the licensing of radio stations. The CATV regulations contemplated by the rules and actions here involved obviously are not consistent either with the provisions of the Act (or any other law) concerning common carrier regulation or with those concerning the licensing of radio transmission and, accordingly, must be declared unlawful for the very reasons the Commission relies on in support of their validity.

The Commission would have it appear (without explanation) that the CATV rules, and the actions here complained of, are necessary for the purpose of carrying out the provisions of Section 307(b) of the Act, i.e., "to prevent frustration of Section 307(b) by CATV." Section 307(b), however, is specifically limited to the licensing and regulation of radio stations and in view of *Regents of Georgia v. Carroll, supra*, no validity can be attached to the Commission's assertion of jurisdiction over wired CATV systems. Moreover, Section 307(b) has nothing to do with

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licensee receives no rights in the channel beyond the term of its license, the Commission may grant a license to a competitor even though it results in an economic injury to an existing station. Although the licensee's business as such is not regulated, the qualifications of the licensee and the character of its broadcasts may be weighed in determining whether or not to grant a license. *Federal Communications Com. v. Sanders Bros. Radio Station*, 309 US 470, 475, 84 L ed 869, 874, 60 S Ct 693; *National Broadcasting Co. v. United States*, 319 US 190, 218, 227, 87 L ed 1344, 1363, 1368, 63 S Ct 997. These cases make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions."



the establishment of any communications policy — federally dictated or otherwise. It does not assure any person, or any community, or any group of persons, access to any television signals or programs. It merely directs the Commission, when it considers "...applications for licenses, and modifications and renewals thereof, ..." and "...when and insofar as there is a demand for . . ." the facilities applied for, to ". . . make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

CATV systems have no need for radio frequencies; they are not making a demand for them, and they are not applying to the Federal Communications Commission for anything. It is submitted, therefore, that Section 307(b) has nothing to do with the operation of a perfectly lawful and locally authorized CATV business, the only purpose of which is to perfect the ability of the public to receive the "radio communications" that the Communications Act specifically indicates the public is entitled to receive.

Petitioners have no quarrel with the Commission's objective of allocating and assigning broadcast frequencies with a view to "making available, *so far as possible*, to all the people of the United States a rapid, efficient, nation-wide, and world-wide wire and radio communications service" (emphasis supplied). This, in fact, is the responsibility Congress has assigned to the Commission under Section 1 of the Communications Act. On the other hand, Petitioners do challenge the legality of the Commission's efforts to foreclose CATV service to those "people of the United States" who at the very least must feel that such service adds to the *efficiency* of their television "service." Some of those people must also believe that CATV brings them somewhat closer to nation-wide, and even world-wide, communication than they would be if left solely to the offerings of stations which they, as individuals, can receive directly off-the-air.

In any event, it is clear that Congress never intended, and that Section 1 of the Communications Act does not direct, the Federal Communications Commission to assume the responsibility of insuring any kind of communications system to "the people of the United States." Section 1 merely states the purpose for which the Federal Communications Commission was created. The power and authority to be exercised by the Commission, and the limitations on its power and authority, are thereafter proscribed by Titles II and III of the Act.<sup>9</sup>

If Title III of the Act gives the Commission the power and authority to control non-common carrier CATV systems so that those systems do not frustrate Section 307(b), and the allocation policies adopted by the Commission with a view to implementing the objectives of that Section, then the Commission also has the power and authority to adopt rules and regulations requiring television viewers to tune their sets only to their home community stations. Section 307(b) and the Commission's allocation policies are just as likely to be frustrated by tall receiving antennae, individually owned and maintained, as by CATV connections. Obviously, however, the Communications Act in general,

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<sup>9</sup> As pointed out above, the Commission's principal basis for asserting jurisdiction over CATV systems and for adopting the rules here involved appears to be the need for implementing Section 307(b) of the Act. However, the Commission also contends that the rules are proper implementations of Sections 1 and 303(h) and (s). Section 303(h) authorizes the Commission "to establish areas or zones to be served by any station" and 303(s) to require that only so-called "all channel" (VHF and UHF) television receiving sets be shipped in interstate commerce. The CATV rules obviously have nothing to do with defining areas to be served by radio (television broadcast) stations or with the shipment of receiving sets in interstate commerce. Sections 308 and 309 are also mentioned as a basis for the Commission's authority in the Second Report and Order, but an explanation of their relationship is not attempted. In any event, with the exception of 303(s), the authority given the Commission by any of these Sections of the Act must be limited and related to the Commission's basic power to license radio stations. *Regents of Georgia v. Carroll, supra*. As to Section 303(s), the authority therein provided was specifically given the Commission by a separately adopted amendment to the Act. Its proper relationship to the present controversy is explained *infra*.



and Section 307(b) in particular, do not authorize the Commission to dictate which stations viewers may watch on their sets.

If, in fact, the Communications Act does empower the Commission to adopt rules and take actions governing CATV systems in order that Section 307(b) not be frustrated, then the Act, prior to July 10, 1962, also empowered the Commission to adopt any rules and to take any actions necessary to insure that all television receiving sets shipped in interstate commerce be capable of receiving all frequencies (VHF and UHF) allocated by the Commission to television broadcasting, *and it now empowers the Commission to foreclose the sale of any television receiving set capable of receiving Los Angeles television station signals to any resident of San Diego or any other community.*

There is no legally significant difference between foreclosing or limiting the use of CATV apparatus and foreclosing or limiting the use of individual receiving sets, yet in 1962 the Commission stated that it needed legislation to accomplish the latter<sup>10</sup> while today it insists it needs no legislation to accomplish the former. If this Court affirms the Commission's actions asserting jurisdiction over CATV systems, it will judicially sanction the power and authority of the Commission to dictate the receiving capacity of every television set used, not only in the San Diego area, but throughout the country.

Furthermore, the two methods of reception, one via CATV wire connections and the other via home receiving antennae and related transmission lines, cannot be legally distinguished on the basis of Sections 2(a) and 3(a) of the Act. Section 2(a) merely provides that the *provisions* of the Act shall apply to all interstate and foreign communications by wire or radio, i.e., the provisions of Title II shall apply to

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<sup>10</sup> See, H. Rep. No. 1559, 87th Cong., 2d Sess. (1962), and S. R. No. 1526, 87th Cong., 2d Sess. (1962), to accompany H.R. 8031 (1 Pike & Fischer, R.R. 10:481-10:518).

common carriers (whether engaged in wire or radio communications), and the provisions of Title III shall apply to the licensing of *radio* stations.

Section 3(a) on the other hand (as well as Section 3(b)), is merely concerned with defining "communications" to insure that all phases of common carrier activity — not merely the transmission function — are subject to regulation under the provisions of Title II. In this connection, it will be noted that the definitions of "wire communication" and "radio communications" in Sections 3(a) and (b) include ". . . all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to . . . transmission." The basic purpose of including in both Sections 3(a) and (b) such "services" as the "receipt, forwarding and delivery" of communications as well as "instrumentalities, facilities, apparatus," incidental to transmission was to assure that all phases of point-to-point wire and radio communications would be subject to the provisions of Title II of the Act. By their very terms, these Sections have no meaning insofar as the licensing and related provisions of Title III of the Act are concerned. If Congress had intended to include the receipt, forwarding and delivery of radio signals *per se* within the meaning of the Commission's non-common carrier licensing responsibilities, it would have done so specifically. In particular, it would have done so in Section 3(o) wherein "broadcasting" is defined.

It follows, therefore, that Sections 2(a) and 3(a) of the Act cannot be used as a bridge whereby the provisions of Sections 303(f), (h), (p), (r) and (s), 307(b), 308, 309 or any other Section of Title III are made applicable to the dissemination of information (writing, signs, signals, pictures, sounds, etc.) by wire, cable or other like connections or to the reception of such information so transmitted. These provisions deal specifically with "radio stations" and the transmission of radio energy, and they are applicable only to radio stations. Since CATV

systems are not radio stations, they cannot be controlled or regulated in any way under Title III of the Act, and the Commission's efforts to so control and regulate them are, therefore, unlawful.

As pointed out hereinafter (see, footnote 13, *infra*,) the Commission, itself, determined in 1959 that it could not lawfully regulate CATV systems as it now asserts it can. The base of the Commission's authority, the Communications Act, has not been changed since this pronouncement and, consequently, the Commission has no more power and authority today than it had in 1959.<sup>11</sup> While the Commission has again recently requested the Congress to amend the Act so as to specifically

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<sup>11</sup> The Commission's admitted lack of jurisdiction over CATV systems was judicially noticed by the United States District Court for the District of Idaho (Southern Division) in *Cable Vision, Inc. v. KUTV, Inc.*, 211 F. Supp. 47 (1962), *reversed on other grounds*, 335 F.2d 348 (C.C.A. 9th, 1964), wherein, at page 55, the Court stated as follows:

"As indicated in this Court's previous discussion of the history of this so-called consent provision, community antenna services are not 'broadcasters' within the meaning of the definition of 'broadcasting' as presently stated in the Federal Communications Act. (FCA, 47 USC 153 (a)). The Congress has consistently refused to adopt amendments necessary to make that provision applicable to community antenna services. . . .

"So it is that under present national policy, community antenna services remain a permissible and as yet unregulated means of television reception. Accordingly, the Federal Communications Commission has held that it does not now have jurisdiction over community antenna services."

Earlier, on September 8, 1959, Senatore Pastore, from the Committee on Interstate and Foreign Commerce, reported to the United States Senate Bill S. 2655 entitled, "A Bill to amend the Communications Act of 1934 *to establish jurisdiction in the Federal Communications Commission over community antenna systems.*" (Emphasis supplied) Calendar No. 950, S. 2653 (Report No. 923), 86th Cong., 1st Sess. In 1960, following debate on the floor of the Senate, this Bill was recommitted to the Committee. 106 Cong. Rec. 10326, 10344, 10407, 10520, and 10547.

If, as is specifically stated, the purpose of S.2653 was to establish the Commission's jurisdiction over CATV, then its failure of passage of necessity left the Commission where it was (and where it is today), i.e., without jurisdiction.



give it statutory authority over CATV systems (See H. Rep. No. 1635, 89th Cong., 2d Sess., submitted June 17, 1966, to accompany H. R. 13286), no legislation has been forthcoming.

Moreover, there is a serious question as to whether H. R. 13286 or any similar legislation will ever be adopted. Consider, for instance, the following minority views on the Bill (H. Rep. No. 1635, *supra*, at pages 23 - 25):

"H. R. 13286 is a bill that was prepared by the Federal Communications Commission and forwarded to the Congress with the request that it be passed. It is not an administration bill. It is an attempt by a Federal agency to force Congress to give it jurisdiction which it heretofore claimed it did not have. The passage of this bill at this time would serve to underwrite an unauthorized assumption of jurisdiction by the Federal Communications Commission; . . . it would create an entirely new concept of regulation at Federal level; it would violate the constitutional guarantees of the first amendment; it would permit a Federal administrative agency (supposedly an arm of the Congress, created by the Congress) to write substantive law by the exercise of rulemaking powers; it would authorize a Federal agency, not answerable to the electorate, to repeal the laws of the several States by rulemaking powers; it would authorize monopolistic practices in the broadcasting of professional sports events and deny millions of people the opportunity of witnessing these events by television; it would create the power of censorship in the Federal Communications Commission insofar as CATV systems are concerned; it would give the Federal Communications Commission the authority in certain areas to determine what a person could or could not receive over his television or radio set — to name a few of the flaws.

"Television and radio were not intended to be regulated in the same manner as public utilities. They were subjected to regulation only because of the lim-

ited frequencies available in the spectrum. Regulation was for the sole purpose of properly policing the spectrum and seeing that it was not abused. Hence, licenses for broadcasting radio signals were required, because the spectrum was public domain and subject to the police powers of the sovereign.

"The history of the Communications Act of 1927 and the amendments thereto of 1934 reflects clearly that the purpose of regulation was to make it possible for the full spectrum to be used in an orderly manner so that broadcast signals would not conflict with each other and thereby create a pandemonium of static which would be of no use to anyone. The operation of the businesses operating under licenses issued by the Government was to be on the free enterprise base. In other words, it was spelled out in the history that the Government would not have jurisdiction of the economics of the several broadcasters. Whether or not they were able to stay in business or to be successful in their operations was to be determined solely by the traditional free enterprise system upon which this country was built. Many attempts have been made by the Federal Communications Commission to gain economic control over the broadcasters. The most recent attempt was in 1963 when the Commission issued orders limiting the length and frequency of broadcast commercials. The House of Representatives struck down this attempt by the passage of a bill denying them the power to enter the field of economic control.

"H.R. 13286 as proposed by the Federal Communications Commission is an attempt to gain economic control over CATV systems and thence to move forward to gain economic control over broadcasters and thereby measurably expand the regulatory powers of the Communications Commission on a Federal basis.

"A CATV system is a wired communications system and does not use the spectrum or public domain



for broadcasting purposes. Hence, the Commission has heretofore held on several occasions that it did not have jurisdiction of CATV systems as such.

"There are three methods by which programs can be received by a CATV system to be transmitted over its wires:

1. The pure off-the-air system. This is the case where a high antenna is employed to catch any broadcast signals that happen to come its way.

2. The microwave-fed system. This is the system where the original broadcast is re-broadcast through the spectrum, one or several times, until it reaches its desired destination. (The FCC has jurisdiction over the microwave facility because it is a rebroadcast into the spectrum, but not over the reception facility.)

3. The coaxial cable. This is a system where a coaxial cable is employed from the broadcasting station to the CATV system. If the coaxial cable does not cross a State line, the Federal Communications Commission does not have jurisdiction. If the coaxial cable does cross a State line, the jurisdiction of the FCC attaches under its jurisdiction over an interstate common carrier by wire. However, in this case the jurisdiction of the Commission does not extend to a determination of what can or cannot be carried over the wire.

"The present bill is designed to give the Federal Communications Commission absolute control over reception by all three methods. The main objective of the Federal Communications Commission is to gain control over the off-the-air (subpar. 1 above) and the coaxial cable (subpar. 3 above), for by this method the Com-

mission can gain direct control over reception of television signals insofar as all CATV systems are concerned. It has had an indirect, limited power over CATV systems using microwave. The operator of a microwave facility must get a license from the Federal Communications Commission because he is transmitting radio signals. The Commission has taken the position that it can issue a license with restrictions and conditions as to what the microwave operator can transmit, even though section 326 of the Communication Act prohibits censorship.

"If the Congress passes H. R. 13286 it will open the door wide for the Federal Communications Commission to gain jurisdiction over the reception of television and radio signals — jurisdiction positively denied the Federal Communications Commission under the Communications Act as amended in 1934. It will enable the Commission to determine what can be received by the viewers of this Nation from satellite transmittals, as well as local broadcasting stations and network broadcasts. Freedom requires that full freedom of communications and information be preserved and protected. The passage of H.R. 13286 would do irreparable damage to this freedom. The people in the fringe areas of radio and television reception would be at the mercy of the Federal Communications Commission and its rulemaking powers.

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"It is to be noted that the Federal Communications Commission, although previously denying jurisdiction in the field of CATV, in the early months of 1966 completely reversed their position and assumed jurisdiction over all CATV operations. Lawsuits were filed and are now pending. The Federal Communications Commission, no doubt fearing that it had flagrantly overstepped its jurisdiction, came to the Congress to put its stamp of approval on such action. It is asking the Congress at the present time to give it unbridled

authority to control every aspect of the CATV business, a power it has never had over the broadcasting business, but which it wants badly — an entirely new concept in governmental regulation."

The legislation proposed in H.R. 13268 would give the Commission essentially the same jurisdiction, power and authority, which the Commission has already asserted without benefit of statute. Obviously, its asserted authority, and the attempted exercise thereof in the manner provided by the CATV rules and the action here on appeal, are unlawful, among other reasons, because Congress has not "put its stamp of approval on such action."

For these reasons, it is submitted that the Commission lacks the statutory authority to regulate CATV systems and the order staying the expansion of Petitioners' lawful business is illegal and must be set aside.

#### IV

#### **The CATV Rules and the Issuance of a Stay Thereunder Abridge Petitioners' and the Public's Right to Freedom of Speech Protected by the First Amendment**

The Commission's stay order, issued under the authority of Section 74.1109, which specifically prohibits Petitioners' CATV systems from carrying the signals of the Los Angeles television stations to new subscribers in the San Diego area raises an important constitutional issue. Moreover, the constitutional issue is also presented by the fact that the CATV rules limit the right of CATV systems to carry the television signals of their choice, require that certain other television signals must be carried, and require non-duplication of other television signals. It is submitted that both the stay order and the rules constitute a prior restraint which is prohibited by the First Amendment, if it is determined that CATV systems are entitled to this protection, and

there are no public interest considerations justifying such restrictions. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098 (1952); *Near v. Minnesota*, 283 U.S. 697, 75 L. Ed. 1357 (1931).

The first question to be answered is whether the transmission of television signals by CATV systems is within the purview of the First Amendment.<sup>12</sup> In this regard, it is clear that the Supreme Court has been liberal in its interpretation of the protection afforded by the First Amendment. It has held that retail book sellers, newspapers, pamphlets, leaflets and every sort of publication, motion pictures and stage presentations are protected. *Smith v. California*, 361 U.S. 147, 4 L. Ed. 205 (1959); *Kinglsey International Picture Corp. v. Regents of University of State of New York*, 360 U.S. 684, 3 L. Ed. 2d 1512 (1959); *Lovell v. City of Griffin*, 303 U.S. 444, 82 L. Ed. 949 (1938).

The right of freedom of speech and the press, guaranteed by the First Amendment, includes not only the right to utter or to print, but also the right to distribute, the right to receive and the right to read. *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510 (1965). See also, *Saia v. New York*, 334 U.S. 558, 92 L. Ed. 1574 (1948); *Winters v. New York*, 333 U.S. 507, 92 L. Ed. 840 (1948). "This freedom clearly embraces the right to distribute literature and necessarily protects the right to receive it." *Martin v. Struthers*, 319 U.S. 141, 143, 87 L. Ed. 1313, 1317 (1943). In *Lovell v. Griffin*, *supra*, at 452, the Court stated:

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<sup>12</sup> The Commission suggests in its Motion for Reconsideration of the Stay Order, page 24, that CATV systems need authorizations to carry the signals of television stations. Except for copyright requirements and the new CATV Rules which provide that certain signals cannot be carried without permission, Petitioners know of no legal authority that a CATV system is not free to carry the signals of any television station. The Commission cites no authority for its contention. See, *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348 (C.C.A. 9th, 1964), *cert. denied*, 379 U.S. 989, 13 L. Ed. 2d 609 (1965).



"Liberty of circulation is as essential to the freedom as liberty of publishing; indeed, without circulation, the publication would be of little value."

The same statement was cited with approval by the Supreme Court in *Talley v. California*, 362 U.S. 60, 64, 4 L. Ed. 2d 599, 563 (1960).

Finally, both the Courts and the Federal Communications Commission have held that communication by radio and television falls within the Constitutional protection. *Farmers Educational and Cooperative Union of America v. WDAY, Inc.*, 360 U.S. 525, 529, 3 L. Ed. 2d 1407, 1411 (1959); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226-227, 87 L. Ed. 1344, 1368 (1943); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166, 92 L. Ed. 1260, 1297 (1948) (dictum); *Superior Films, Inc. v. Department of Education*, 346 U.S. 587, 588-589, 98 L. Ed 329, 331 (1954) (concurring opinion). See *Rumeley v. United States*, 90 U.S. App. D.C. 382, 393, 197 F.2d 166, 177 (1952), *aff'd*, 345 U.S. 41, 97 L. Ed. 770 (1953); *Report and Statement of Policy on Programming Inquiry*, 20 Pike & Fischer, R.R. 1901, 1905 (July 29, 1960); *In re, Complaint of Anti-Defamation League of B'nai B'rith Against Station KTYM*, 7 Pike & Fischer, R.R. 2d 565, 567 (1966).

In light of these cases, there can be no doubt that CATV systems are also entitled to the protection of the First Amendment. In line with these authorities, the Supreme Court of California, in *Weaver v. Jordan*, 411 P.2d 289 (California 1966), held that subscription television is protected by the constitutional guarantee of free speech. Subscription television (the dissemination by wire of programs originated by the system which the viewer receives upon payment) uses method of transmission identical with that of CATV systems. In this opinion, the Court distinguished the Supreme Court's decision in *National Broadcasting Co., Inc. v. United States*, *supra*, and stated:

"We are convinced that the sweeping suppression



of home subscription television as attempted by the Act now before us, would, contrary to the Act declarations, encourage and foster monopolistic domination by existing television stations deriving their financial support from commercial advertisers. (See fn. 11, *ante*) Monopoly in the field of communication can best be avoided by permitting the growth of that field of endeavor in directions and through media which will provide the widest possible range and choice of ideas and of expression." *Weaver v. Jordan*, *supra* at 299.

More important, the freedom involved in this case is not just that of Petitioners. It is the freedom of the American public, in this case the citizens of the San Diego area, which is restricted by the Commission's action. They are the ones who are now denied the right to receive the signals of the Los Angeles stations, for an indefinite period, and may be permanently deprived of the right under the self-granted authority asserted by the Commission in Section 74.1109. Moreover, there can be no doubt that Petitioners have standing to assert the right of the American public to receive the television signals of their own choice. *Griswold v. Connecticut*, *supra*, at 481; *Barrows v. Jackson*, 346 U.S. 249, 97 L. Ed. 1586 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510, 69 L. Ed. 1070 (1925).

Once it has been determined that the rights of parties under the First Amendment have been affected by the action challenged, it is the duty of this Court to determine whether such conduct is prohibited. In reality, therefore, the real issue is whether there exists some public interest factor which justifies a restriction of the freedom of speech guaranteed by the First Amendment. In this regard, one must keep in mind the warning of the Supreme Court that ". . . any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 9 L. Ed. 2d 584, 593 (1963). The Court has also stated

that only considerations of the greatest urgency can justify restrictions on freedom of speech, and the validity of a restraint of speech in each instance depends on careful analysis of the particular circumstances. *Speiser v. Randall*, 357 U.S. 513, 521, 2 L. Ed. 1460, 1469 (1958).

The Commission insists that its power to restrict freedom of speech comes from the power delegated to it by Congress to regulate interstate commerce. The Supreme Court in *American Communications Ass'n. v. Dowds*, 339 U.S. 382, 399, 94 L. Ed. 925, 944 (1950), *reh. denied*, 339 U.S. 990, 94 L. Ed. 1391 (1950), pointed out how conflicts between the commerce power and the First Amendment are to be resolved:

"When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgment of speech, the duty of the courts is to determine which of these conflicting interests demands the greater protection under the particular circumstances presented."

In this case, however, the order and regulation result in a direct abridgement of speech. Thus, the justification for the restrictions must be more clear and compelling. It is submitted, however, that the Memorandum Opinion and Order of the Commission discloses no evidence nor does it make any valid findings of fact of the existence of any matters or interests that justify the prior restraint imposed in this instance.

The Courts, while holding that radio and television are protected by the principle of freedom of speech, have agreed that this freedom is not absolute. Just as the First Amendment does not protect speech which seriously threatens interests the government should protect, so too the nature of broadcasting may permit limited regulation without violation of the First Amendment. However, a distinguishing feature emerges from an analysis of the decisions of the past and the present

case — all of the past actions of the Commission, that have been affirmed by the Courts, dealt with applicants and licensees using, or seeking to use, the radio spectrum. Because of the scarcity of spectrum space, when read in context with the Congressional standard of "public interest, convenience or necessity," the Courts have found that limited restraints on program content were legitimate measures for the protection of the public.

The Supreme Court in *National Broadcasting Co. Inc. v. United States*, *supra*, held that the right of free speech does not include the right to use the facilities of radio without a license. Based upon that premise, the Courts have extended the exception in other areas, such as requiring an investigation of the needs of the community in order to obtain a license. See, *Henry v. Federal Communications Commission*, 112 U.S. App. D.C. 247, 302 F.2d 191 (1962), *cert. denied*, 371 U.S. 821, 9 L. Ed. 2d 60 (1962). In every case, however, the extension of the "public interest", at the expense of the protection afforded by the First Amendment, has been justified by the concept of a scarcity of radio frequencies and the need to control and license facilities using these frequencies.

The two most recent cases from the United States Court of Appeals for the District of Columbia Circuit are based upon the same principle. In *Carter Mountain Transmission Corporation v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F.2d 359 (1963), *cert. denied*, 375 U.S. 951, 11 L. Ed. 2d 312 (1963), the appellant was a common carrier applicant seeking a license to use microwave frequencies. The Court specifically cited *National Broadcasting Co., Inc., supra*, and held that a conditional grant of license, which is the same as a denial of a license, does not constitute censorship. Moreover, in that case, the Court specifically declined to rule upon the right of the CATV system which was not before the Court. The same reasoning was followed in *Idaho Microwave, Inc. v. Federal Communications Commission*, 352 F.2d 729 (C.A.D.C. 1965).



Because CATV's do not use this valuable spectrum space and their operation in no way limits or curtails the assignment, location and operation of television stations, it is clear that the restrictions on freedom of speech, imposed upon broadcasting, cannot validly be applied to CATV systems. Therefore, any justification for the Commission's prior restraint imposed by the stay order and the CATV rules must come from some other source.

It is also clear that no "clear and present danger" that a substantive evil will otherwise result, which the Commission has a right to prevent, exists in this case. The sole purpose of the rules, as admitted by the Commission, is to prevent the possible demise of UHF television stations, because of economic competition, and the purpose of the stay is to prevent this same result in San Diego. Yet there is nothing in the Memorandum Opinion and Order to show that this danger will occur within the time needed for the Commission to complete a hearing on the merits. Moreover, the issues in the hearing clearly demonstrate that even this alleged "danger" is nothing more than supposition and conjecture at this time and, in fact, is the ultimate issue to be determined by the hearing. Such speculation and conjecture clearly do not constitute the "clear and present danger" which can justify immediate and total restraint of Petitioners' right to transmit television signals over their wired CATV systems.

More important, it is submitted that the stay and the new rules seek to prevent a result which is clearly beyond the power of the Commission to accomplish. The admitted purpose of the rules and the stay is to protect UHF stations from economic competition. To reach this conclusion, the Commission, has assumed, without any findings or evidence to support this assumption, that the public interest requires that San Diego be guaranteed that three UHF stations will be able to exist and the Commission is obligated to suppress or control any economic competition that might threaten the economic well-being of these sta-

tions. The Commission may just as logically and legally limit the amount and kind of news in newspapers which is received from the press services (these services use wire and radio facilities and are in competition with radio and television), the amount and kinds of full-length features that are shown in local theatres (these films are shipped in interstate commerce and compete with films on television), and the height and design of receiving antennae that may be erected by local citizens (for example, in San Diego the receipt of off-the-air Los Angeles signals obviously fragments the local station's audience). The Commission has, in effect, declared that the contents of all sources of information and entertainment may be controlled so that each local television station can be guaranteed an audience and thus survive whether the local citizens desire it or not.<sup>13</sup> In addition, the Commission has created and adopted a second assumption which has never been proven and may not be susceptible of proof. This assumption is that the public interest requires that American citizens be limited to viewing local television stations, no matter what may be their desires and interests. The Commission has taken this drastic step of curtailing the freedom of speech of CATV systems and the freedom to view of American citizens in order to protect an economic monopoly.

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<sup>13</sup> In 1959, when the Commission declined to assume jurisdiction over CATV systems, it made the following statements in its Report and Order:

"In essence, the broadcasters' position shakes down to the fundamental proposition that they wish us to regulate in a manner favorable toward them vis-a-vis any nonbroadcast competitive enterprise. Thus, for example, we might logically be requested to invoke a prohibition against access to common carrier facilities by such enterprises as closed-circuit music and news services, closed-circuit theater television operators, and, possibly, even ordinary motion picture and legitimate stage operators, magazine and newspaper publishers, etc., comprising all of the entities which compete with broadcasting for the time and attention of potential viewers and listeners. The logical absurdity of such a position requires no elaboration." 26 FCC 403, 431-432 (1959).



It is unnecessary to demonstrate by reference to legislative history, and the circumstances which led to their original enactments, that the principal objectives of the Radio Act of 1927, and of Title III of the Communications Act of 1934, were the regulation of the technical aspects of radio frequency allocation, to provide relief from the interference chaos that had developed prior to 1926, to establish a system for the fair, equitable, and efficient distribution of such frequencies in the future, and to regulate ownership and control of stations so as to preserve competition and prevent monopoly in radio communication.

"The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

"In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has

done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

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"... the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

\* \* \*

"... Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public." *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-475, 84 L. Ed. 869, 873-874 (1940).

If, as the Supreme Court says, Congress intended "to leave competition in the business of broadcasting where it found it" and to permit a broadcaster "to survive or succumb according to his ability to make his programs attractive to the public," it obviously intended that the broadcaster was not to be protected against competition.

All free competitive businesses, of course, are subject to some limitations and restrictions, both as to location and product or service, but the restrictions and limitations are such that they do not change the free competitive nature of the business. Otherwise, the business ceases to be freely competitive and becomes a public utility subject to regulation.

Obviously, as the Supreme Court made clear in the *Sanders* decision, Congress did not intend to subject the business of broadcasting to public utility regulation, or to anything similar thereto. In a few instances, Title III of the Communications Act (and its predecessor The Radio Act of 1927), from which the Commission derives its authority, singles out broadcasting for special legislative and regulatory treatment, but otherwise, the Commission's statutory power, authority, and responsibility in connection with the licensing of radio stations for broadcast use is no different than its power, authority, and responsibility in connection with the licensing of the many other classes and types of radio stations subject to the Commission's jurisdiction.

It is not necessary to cite authorities for the proposition that the paramount public policy of the United States as to the relationship of government to business is firmly grounded upon the principle of free and competitive business enterprise and that exceptions to that policy at the Federal level, if they can legally be made at all, can be made by Congress. Tampering with a free competitive business by government to the extent of eliminating competition places that business at least in a public utility category, if not in a category subject to even more governmental supervision, direction, and control than attaches to public utilities.

That Congress did not intend such a result is best illustrated (except perhaps by the language of the Act itself) by the proceedings in the United States Senate in connection with S. 1333. (A Bill to Amend the Communications Act of 1934, and For Other Purposes). S. 1333, among other things, proposed to amend Section 307(b) of the Communications Act of 1934<sup>14</sup> to read as follows:

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<sup>14</sup>Section 307(b), then as now, reads as follows:

"In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for



"In considering applications for licenses, and modifications thereof, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several states and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same, *giving effect in each such instance to the needs and requirements thereof.*" (Emphasis supplied) *Hearings before Subcommittee of the Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess. (1947) 5.*

The obvious purpose of the foregoing amendment was to eliminate the clause "when and insofar as there is demand for the same" from Section 307(b) and to substitute a general requirement that the Commission give effect to the "needs and requirements" of communities where, there was no competitive application from another community for the frequency involved. Testifying in opposition to this amendment, the then Chairman of the Federal Communications Commission, after explaining that the amendment "would delete the requirement as to demand and instead require the Commission to give effect to the needs and requirements of the various communities", pointed out that if the amendment merely required "the Commission to consider the needs and requirements of communities when the issue before the Commission is a question of which of two competing applications from different communities should be granted", it would not be objectionable, since Section 307(b) "as it now stands" requires the same consideration. The change would be objectionable, he testified, if the amendment would require the Commission to consider the "needs and requirements" in the absence of a "competitive application from another community for that frequency." (*Id.* at 33) He then stated:

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the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

"Under the normal operation of the competitive system either you have free competition, or you do not. Either you have free competition, or you have some restriction on free competition.

"Now, if this section is adopted as written, it is certainly going to be urged that it imposes very definite restrictions on free competition; so much so that I am afraid it is going to be successfully argued that if it were enacted, it would throw the competitive system out the window.

"We do not want to do that, and therefore I think that if we are to have some limit on free competition, we have got to have some compass to guide us and tell us exactly what the limits are. I think we have got to work out the formula here in these sessions." (*Id.* at 40)

The proposed amendment was not adopted and thereafter the Court of Appeals for the District of Columbia Circuit acknowledged that the principal of free competition continued to govern the Federal Government's relationship to the broadcast industry:

". . . Competition, of course, is between broadcasters on different frequencies covering the same area. *If there be only one applicant for a given frequency in a given area, the community need for a new station and the relative ability, above the minimum requirements of the applicant to render service are immaterial.* But, if a choice must be made between two qualified applicants, the problem has a different aspect. And, if a choice must be made between two communities, still further considerations are involved. In the latter case, the public interest and an equitable distribution of service may well require a determination of the relative needs of the communities for more service. . . ." (Emphasis supplied) *Easton Publishing Co. v. Federal Communications Commission*, 85 U.S. App. D.C. 33, 35, 175 F.2d 344, 346 (1949).



Heretofore, the Commission has asserted, and the Courts have upheld, the right to consider economic competition in one instance, alone. This right has been limited to the effect of economic competition upon the public interest in awarding a license to a new broadcast station when it would be in competition with an existing station in the same community. This doctrine was promulgated over the objections of the Commission, by the United States Court of Appeals for the District of Columbia Circuit in *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 349, 258 F.2d 440, 443. (1958). In that case, the Court held that under the language of *Sanders, supra*, the Commission had the power and responsibility to determine whether the award of a second license in the area would be to damage or destroy service to an extent inconsistent with the public interest. The Court then stated:

"This opinion is not to be construed or applied as a mandate to the Commission to hear and decide the economic effects of every new license grant. It has no such meaning. We hold that, when an existing licensee offers to prove that the economic effect of another station would be detrimental to the public interest, the Commission should afford an opportunity for presentation of such proof, and, if the evidence is substantial (i.e., if the protestant does not fail entirely to meet his burden), should make a finding or findings."

Since that time, the same Court has upheld the doctrine in awarding airline licenses, *Delta Air Lines, Inc. v. C.A.B.*, 107 U.S. App. D.C. 180, 275 F.2d 632 (1959), microwave licenses, *Carter Mountain Transmission Corporation v. Federal Communications Commission, supra*, and in rule making proceedings for the allocation of additional television channels to a community. *Fort Harrison Telecasting Corporation v. Federal Communications Commission*, 116 U.S. App. D.C. 347, 324 F.2d 379 (1963). It has agreed with the Commission that the doctrine does not

apply to assignment of licenses but only to original grants. *Valley Telecasting Co., Inc. v. Federal Communications Commission*, 338 F. 2d 278 (U.S. App. D.C. 1964).<sup>15</sup>

The Commission now claims the authority to control economic competition by non-licensed businesses so that it can guarantee that existing broadcast licensees will be able to operate in the "public interest." It asserts this power, not over other licensees, but over CATV systems and, more importantly, the public. If it can successfully curtail the public's freedom to view by limiting the right of CATV systems to deliver television signals, it can also curtail the public's right to erect tall antennae by which it is able to receive Los Angeles television signals off-the-air. It can also require television manufacturers to sell sets in San Diego capable of receiving local television signals only.

The Commission has consistently maintained that its rules and policies setting up the "fairness"<sup>16</sup> doctrine are constitutional because they protect the right of the American citizen to see and hear what he chooses. In the 1949 Report, *Editorializing by Broadcast Licensees*, 13 FCC 1246, 1257 (1949), the Commission stated:

"The most significant meaning of freedom of the radio is the right of the American people to listen to the great medium of communications free from any government dictation as to what they can or cannot hear and free alike from similar restraints by private licensees."

The stay in this case and the new CATV rules violate this basic concept.

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<sup>15</sup> The doctrine, even in present limited aspect, has been the subject of criticism. *Refusal of Radio and Television Licenses on Economic Grounds*, 46 Va. L. Rev. 1391 (1960).

<sup>16</sup> The doctrine provides that, if a station presents one side of a controversial issue, it must seek out and present the opposing viewpoint.

This Court is charged with the duty of determining whether the freedom granted by the First Amendment may be curtailed by the Commission in an effort to limit economic competition to local television stations. It must determine whether the American public is to see over the air only what the Commission and local licensees choose to give them. There is no evidence, findings or suggestions that the three VHF stations in the area cannot compete against Los Angeles television signals. There is nothing but speculation that UHF stations can survive in the face of VHF competition *only if the service of CATV systems are curtailed or eliminated*. It is clear that these factors do not constitute "considerations of the greatest urgency" which justify these direct restrictions on freedom of speech and the public's freedom to view the programs of its own choice. Even if UHF television in San Diego must cease to exist, it would be a small price to pay to protect the freedom of the American people to view television programs of its own choice, which programs are freely available to it. Such a limitation cannot be justified by the Commission's assertion that CATV systems are "legally and in every practical sense a part of the interstate transmissions of the stations" whose signals are carried on their cables and thus subject to the same restrictions as television stations themselves.<sup>17</sup> This fact might give Congress the power to control CATV systems in some respects if it chose to do so, but it is no justification for direct restrictions upon freedom of speech. For these reasons, it is submitted that the Commission's stay, prohibiting Petitioners from bringing Los Angeles television signals to the citizens of San Diego, and the provisions of the CATV Rules limiting the right of CATV systems to carry the television signals of their choice are illegal and prohibited prior restraints upon freedom of speech.

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<sup>17</sup> Motion of Respondents for Reconsideration of Stay Order and Opposition to Motion for Stay, Case Nos. 21,183, 21,192, p. 24.



## V

**Section 74.1109 of the Rules Adopted by the Commission To Control CATV Systems Is Void for Failure of the Commission To Comply With the Provisions of Section 4 of the Administrative Procedure Act**

The stay order under review by this Court was based upon the authority conferred upon the Commission by Section 74.1109. Unless this section was validly adopted, the power to issue the temporary stay and the authority to designate the proceeding for hearing does not exist. Thus, the question is whether the Commission gave notice, adequate to comply with Section 4 of the Administrative Procedure Act, that adoption of Section 74.1109 was proposed.<sup>12</sup> It is submitted that the answer to this question is *no*.

Section 4(a) and (b) of the Administrative Procedure Act, 60 STAT. 237, 5 U.S.C.A. §§ 1003(a) and (b) (Supp. 1950), set out the procedures to be followed by federal agencies in rule-making. The former requires the publication in the Federal Register of a notice of proposed rule-making including "either the terms or substance of the proposed rule or a description of the subjects and issues involved."<sup>13</sup> The latter requires that, after publication of a notice of proposed rule-making, the agency afford "interested persons an opportunity to participate in the

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<sup>12</sup> The Administrative Procedure Act is to be given liberal interpretation so as to give effect to its remedial purposes. As stated by the Supreme Court, "... it would be a disservice to our form of government and to the administrative process, itself, if the courts should fail, so far as the terms of the Act warrant, to give effect to its remedial purposes where the evils it was aimed at appear." *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41, 94 L. Ed. 616, 624 (1950).

<sup>13</sup> The legislative history of the Administrative Procedure Act makes clear that the notice issued by the agency in compliance of the mandate of Section 4(a) "must be sufficient to fairly apprise interested parties of the issues involved so that they may present responsive data or argument relating thereto," and that "where notice is required, it should be complete and specific." S. Doc. No. 248, 79th Cong., 2d Sess. (1946) 200, 358.

rule-making through submission of written data, views or arguments . . ."

Section 74.1109 of the rules, adopted by the Commission on March 4, 1966, and published in the Federal Register on March 17, 1966, (31 F.R. 4540), allows the Commission to "waive any provision" of the CATV rules, "impose additional or different requirements, or issue a ruling on a complaint or disputed question." Its terms also allow the Commission to determine, in the event the Commission decides to order an evidentiary hearing upon a petition submitted under Section 74.1109, ". . . whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief." Its terms do not require a hearing prior to the taking of any action which the Commission claims the right to do under the provisions of Section 74.1109.

Petitioners submit they never had the right, guaranteed by Section 4(b) of the Act, to present arguments in opposition to the adoption of Section 74.1109, because this proposed rule was never incorporated in a Notice of Proposed Rule Making which complied with Section 4(a) of the Act. Despite the fact that the Commission's Notice of April 23, 1965, (30 F.R. 6078) dealt with CATV in many respects, there was no hint that a rule such as Section 74.1109 was under consideration, or was proposed by any party. Moreover, the waiver and declaratory order provisions of Section 74.1109(a) were apparently not needed and their inclusion appears to serve no purpose. After all, the Commission's rules now and in the past have contained a provision for obtaining waivers of its own rules (Section 1.3) and for resolving controversy or uncertainty through a declaratory ruling (Section 1.2), both of which sections, however, require such action to be in accordance with the requirements of the Administrative Procedure Act. However, no existing rule of the Commission allowed the imposition of ". . . additional or different requirements", or the issuance of a stay without a hearing. Yet, these are the new and unusual provisions which were adopted along



with several other rules relating to CATV systems after what the Commission claims was a rule-making proceeding in which many comments and reply comments, none of which related to Section 74.1109, were "fully considered by the Commission." (31 F.R. 4540) All other substantive provisions of the other CATV rules fade into ineffectiveness under the impact of this provision of Section 74.1109, which gives the Commission total discretion over the activities of CATV systems, even to the point of ordering curtailment of activities permitted by other provisions of the CATV rules. It may be suggested that these new and expanded powers were adopted when it appeared that the other proposed rules would not be adequate to remedy what the Commission considered to be a growing problem. However, the Commission cannot remedy the inadequacies of a rule-making proceeding by adopting new and different rules than those proposed. If the Commission at the end of the proceeding does not have sufficient data to promulgate rules of "future effect designed to implement, interpret, or prescribe law or policy", [Section 2(c), Administrative Procedure Act, 5 U.S.C. 1001(c)], then the rule-making proceeding should be renewed or continued.

It is submitted that a complete reading of the Notice of Inquiry and Proposed Rule-Making of April 23, 1965, shows that the Commission proposed, (Para. 30; 30 F.R. 6082), at the very most, to adopt for non-microwave CATV systems the same rules as to carriage and non-duplication as were adopted that day for microwave service to CATV systems, (30 F.R. 6038, 6060), and to implement, while conducting an extensive inquiry into all aspects of CATV, an interim policy as to non-microwave served CATV systems. The interim policy might, as the Commission suggested in Paragraph 50 of the Notice, (30 F.R. 6085) prohibit the extension of the signal of any television station beyond its Grade B contour into a community with four or more commercial channel assignments and three or more stations in operation, or with at least two stations in operation and one or more stations authorized or applied for.

Paragraph 50 of the Notice must be read for what it is, strictly a request for consideration of interim proposals, and cannot be blown up into a full rule-making proposal, as the Commission would seek to do. (See, *In the Matter of Docket Nos. 14895, 15233, 15971*, 3 F.C.C. 2d 816, released May 27, 1966, at paragraph 22). In this paragraph of the Notice, the Commission suggested nothing but the possibility of interim measures:

"We, therefore, request comments on what interim course of action, if any, may be appropriately followed by *the* Commission in this respect.<sup>21</sup>

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"<sup>21</sup>Such comments may discuss the jurisdictional as well as the policy considerations in any particular course of action."

The Commission then suggested that it would reach an early determination on the interim course of action, presumably so that interim measures would be in effect while the Commission considered views, arguments and data received in response to the Notice of Inquiry and then proceed to issue a further Notice of Proposed Rule-Making with a proposed comprehensive set of rules to cover all aspects, not merely carriage and non-duplication, of both microwave-served CATV and off-the-air CATV. The Commission obviously wished to be in a position to take interim action after receiving comments on Paragraph 50, and a specific invitation was made for comments on whether the interim action already prescribed for microwave-served CATV systems should apply to all CATV systems. It is clear that the Commission must rely, and does rely, on Paragraph 50 for any and all notice required for the adoption of all of its CATV rules with the exception of carriage and non-duplication.<sup>20</sup> To justify the adoption of Section 74.1109, therefore,

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<sup>20</sup> See, Paragraph 3 of the Commission's Second Report and Order, Docket Nos. 14895, 15223 and 15971, 31 F.R. 4540, which states clearly that no aspects of the proceeding aside from Part I and Paragraph 50 are dealt with.

the Commission must find in the language of Paragraph 50 more than what is patently there, i.e., the interim proposal. To expand Paragraph 50's apparent meaning, the Commission seems to center on the phrase "definitive action", as if this phrase equalled "final action" (See, *In the Matter of Docket Nos. 14895, 15233, 15971, supra*, para. 22). While definitive has as a meaning of finality, it is more appropriate, in the context of Paragraph 50, to understand definitive to mean no more than definite, also a meaning of definitive. To facilitate the promulgation of definite interim rules, the Commission was soliciting comments on the specific interim rules which had been imposed on microwave-served CATV systems. The Commission clearly at that time wanted to adopt a well defined express interim rule, rather than a general interim rule not susceptible of specific application to off-the-air CATV systems.<sup>22</sup> Yet, when the Second Report and Order was issued a year later, it promulgated Section 74.1109. Section 74.1109 is clearly not an interim rule, anymore than is Section 74.1107, the major market-distant signal rule.

Paragraphs 97 and 98 of the Commission's Second Report and Order, (31 F.R. 4540, 4555) allude to comments suggesting that the "Commission should adopt specific rules providing for summary, non-hearing, procedures to handle requests for waiver of the CATV rules or for different treatments or affirmative relief." These comments cannot be considered counter-proposals, in the sense that a counter-proposal may satisfy notice requirements of Section 4(a) of the Administrative Procedure Act. There were *no* proposals made in the Notice of Inquiry and Proposed Rule-Making of April 23, 1965, which suggested a special

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<sup>22</sup> In what subsequent events have proved to be an erroneous statement, the Commission said in its Notice of Inquiry of April 23, 1965, "We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission." (Par. 64, 30 F.R. 6078, 6087).



set of rules might be adopted as to hearing proceedings in CATV matters. To suggest, as the Commission must, that a "description of the subjects and issues involved" appeared in the Notice of April 23, 1965, completely misses the mark as to Section 74.1109 of the CATV rules. Although the rambling Notice mixed obfuscation with exposition on the subject of television and CATV in particular, it nowhere got near suggesting (not even in one of its multifarious footnotes) that the Commission was contemplating assuming summary injunctive powers for itself, abrogating a party's right to hearing, or asserting the right to adopt further restrictions on an *ad hoc* basis.

The leading case on counter-proposals, as satisfying Section 4(a) notice requirements, is *Owensboro-on-the-air v. Federal Communications Commission*, 104 U.S. App. D.C. 391, 262 F.2d 702 (1958), *cert. denied*, 360 U.S. 911, 3 L. Ed 2d 1261 (1959). The Commission's original proposal in that rule-making proceeding had great clarity, specifying the reservation of a stated channel for educational use only, and the release of another stated channel from educational use to allow the possibility of commercial operation of the latter channel. The underlying policy behind the Commission's proposal was also quite clear, although there existed several approaches in line with that policy, and the Commission specifically requested both oppositions to its proposal, and counter or alternative proposals. *Supra*, at 394, 262 F.2d at 705. Further, and of great importance, very few parties had interests in the Commission proposal and the counter-proposals, and all parties who participated in the proceeding had actual knowledge of the several proposals put forth and comments thereon. *Supra*, at 395, 262 F.2d at 706. The Court partially explained its upholding of the Commission's action in *Owensboro* by stating that all parties had actual notice, and that a description of the subjects and issues had been published. However, the Court stated definitely that it "had no intention whatever of accepting a Commission plan of convenience as a substitute for compliance

with the rule-making notice requirements of Section 4 of the Administrative Procedure Act." *Ibid.* In contrast in the instant case, none of the Petitioners had actual notice that any rule resembling Section 74.1109 might be adopted or had been proposed by any person.

A final important aspect of the Commission's proceeding which led to adoption of the CATV rules, including Section 74.1109, is the quasi-adversary nature of the proceeding. Although by its terms a non-adjudicatory proceeding, the rule-making was initiated by television broadcast interests, and the adoption of rules to curb CATV was generally urged by the television broadcast industry. The adoption of restrictive rules was opposed by CATV interests, which supported their arguments by submission of voluminous studies, as did the television broadcasters. There is little doubt but that the two sides considered themselves adversaries in the proceeding; in any event, the rules adopted by the Commission certainly served to restrict CATV systems and to grant valuable rights to television broadcasters. The Commission's Second Report and Order, Docket 15971, summarizes, in its Appendix B, certain of the comments submitted in response to Paragraph 50 of the Notice of Inquiry. (31 F.R. 4565). NCTA (The National Community Television Association) strongly opposed an interim rule such as proposed in Paragraph 50, and it alleged certain factual conclusions indicating that no basis existed for such an interim rule. On the other side, American Broadcasting Company, Westinghouse Broadcasting Company, Storer Broadcasting Co., The Association of Maximum Service Telecasters, Midwest Television, Inc., and many television stations urged the adoption of highly restrictive interim rules, and they alleged facts indicating that a basis might exist for adoption of some interim rules curbing CATV.

Despite the obvious adversary quality to this supposed rule-making proceeding, the Commission did not hold to even the most minimal requirements found in the spirit, as well as the letter, of the Adminis-



trative Procedure Act. The Commission has in the past held oral argument on major rule-making matters;<sup>23</sup> it did not hold oral argument in this proceeding. The Commission has in the past, on both minor and major rule-making matters, released a draft of proposed rules with its Notice of Proposed Rule-Making;<sup>24</sup> it did not release a draft of its proposed CATV rules prior to their adoption.

For the above reasons, it is submitted that Section 74.1109 of the Rules of the Commission was illegally adopted and is void for the failure of the Commission to comply with the provisions of Section 4 of the Administrative Procedure Act in the proceeding leading to its adoption. Thus, the stay order, issued under the authority of Section 74.1109, is clearly illegal, and the Commission's order must be renewed.

### CONCLUSION

For the foregoing reasons, the Memorandum Opinion and Order of the Federal Communications Commission granting a temporary stay of Petitioners' right to carry the signal of the Los Angeles television sta-

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<sup>23</sup> *Petition of CBS, Inc. for Changes in Rules and Standards of Good Engineering Practices Concerning Television Broadcast Stations*. Docket No. 7896, 1 (Part Three) Pike & Fischer, RR 91:261, 91:265-91:276; *Study of Radio and Television Network Broadcasting*, Docket No. 12782, 20 Pike & Fischer, RR 1901; *Amendment of Section IV (Statement of Program Service) of Broadcast Application Forms 301, 303, 314 and 315*, Docket No. 13961, 5 Pike & Fischer, RR 2d 1773.

<sup>24</sup> *In the Matter of Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, Docket No. 12782, FCC 65-227, March 22, 1965; *In the Matter of Amendment of Sections 3.182, 3.185 and 3.190 (Skywave transmission on Class I-B clear channels)*. Docket No. 14307, FCC 61-1206, October 16, 1961; *In the Matter of Amendment of Section 4.602 of the Commission Rules and Regulations to prohibit the assignment of more than one channel to provide duplicate television STL or intercity relay circuits between the same point of origin and destination*. Docket No. 14614, FCC 62-452, April 27, 1962.

tions and designating the proceeding for hearing should be reversed and remanded with instructions to set aside the temporary stay and dismiss the petition of Midwest Television, Inc.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Robert L. Heald



**APPENDIX**  
**CONSTITUTION OF UNITED STATES**  
**FIRST AMENDMENT**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**COMMUNICATIONS ACT OF 1934, AS AMENDED,**  
**66 STAT. 718, 47 U.S.C.A. 151 (1962), *et seq.***

Sec. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission," which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

**APPLICATION OF ACT**

Sec. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio,



and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

Sec. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

(b) "Radio communication" or "communication by radio" means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

Sec. 4. (i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

Sec. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, posses

sion, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall--

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(h) Have authority to establish areas or zones to be served by any station;

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this Act:

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce or is imported from any foreign country into the United States, for sale or resale to the public.

Sec. 307. (b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

ADMINISTRATIVE PROCEDURE ACT,  
60 STAT. 237, 5 U.S.C.A. 1001, *et seq.*:

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—



## App. 5

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

RULES AND REGULATIONS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

**Sec. 1.2 Declaratory rulings.**

The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(Sec. 5(d), 60 Stat. 239; 5 U.S.C. 1004(d) )

**Sec. 1.3 Suspension, amendment, or waiver of rules.**

The provisions of this chapter may be suspended, revoked, amended or waived for good cause shown, in whole or in part, at any time by the Commission, subject to the provisions of the Administrative Procedure Act and the provisions of this chapter. Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.

**Sec. 1.106 (n)**

Without special order of the Commission, the filing of a petition for reconsideration shall not excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof. However, upon good cause shown, the Commission will stay the effectiveness of its order or requirement pending a decision on the petition for reconsideration. (This paragraph applies only to actions of the Commission en banc. For provisions applicable to actions under delegated authority, see § 1.102.)



BRIEF FOR RESPONDENTS

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In the United States Court of Appeals  
for the Ninth Circuit

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Case No. 21183

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SOUTHWESTERN CABLE CO., PETITIONER

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNI-  
CATIONS COMMISSION, RESPONDENTS, JACK O. GROSS,  
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ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

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*ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION*

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**BRIEF FOR RESPONDENTS**

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**JURISDICTIONAL STATEMENT**

The petitions for review were filed pursuant to Sec-  
tion 402(a) of the Communications Act of 1934, as  
amended, 47 U.S.C. § 402(a), and the Judicial Review

Act of 1950, 5 U.S.C. § 1031, *et seq.* Petitioners seek review of a Memorandum Opinion and Order of the Federal Communications Commission released July 25, 1966 (R. 577-598) which designated for evidentiary hearing the question of the effect of petitioners' community antenna television operations in the San Diego area upon the public interest, insofar as petitioners bring Los Angeles television signals into San Diego, and which directed petitioners to limit the expansion of their systems pending that hearing.

### COUNTERSTATEMENT OF FACTS

Because petitioners' statements of the case are argumentative and incomplete, the following counterstatement is submitted to assist the Court.

#### 1. *Background*

Originally, community antenna television systems (commonly called CATV<sup>1</sup> systems) came into being to bring television to areas not reached by any television station because of remoteness or terrain, and to afford multiple services to areas not already having

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<sup>1</sup>The Commission's rules define a community antenna television system as "any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house." Section 74.1101(a), 31 F.R. at 4570, 2 F.C.C. 2d at 801.



them. Distance from originating stations, intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. Where such conditions prevail, an elaborate master antenna may be erected at a suitable location, usually on a mountain or other high elevation, where the reception of the signals of the desired stations is strong, and the signal may be amplified and brought to the community by cable or radio hops, and then distributed by cable to the homes of individual customers within the community.<sup>2</sup> At the home, the incoming cable is attached directly to the receiving connection of a regular television set.

While the early CATV systems customarily offered programs on three channels, the newer systems generally have a twelve channel capacity, and a twenty channel capacity is being projected for systems in the near future. The latest estimates place the number of systems in existence at over 1,600. The distances which signals are taken has also greatly increased, to as much as 600 miles. (See Second Report and Order of the Commission, pars. 116, 117, 31 F.R. at 4557-8, 2 F.C.C. 2d at 771-2.)<sup>3</sup>

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<sup>2</sup> The distribution cable facilities may be supported on electric power or telephone utility poles, and easements and rights-of-way to use streets and alleys are often obtained from the municipal government, as are franchises to engage in the business.

<sup>3</sup> The Second Report and Order in Docket Nos. 14895, 15233 and 15971, *et al.*, is the Commission opinion released March 8, 1966 adopting the rules governing CATV operation. It is attached hereto as Appendix B.

Along with this general growth of CATVs, there has been a gradual change in the focus of attention of community antenna operators. While franchises were initially obtained only in underserved communities of small or modest size, CATV franchises are now being sought or obtained in the largest cities. (Second Report and Order, par. 117, 31 F.R. at 4558, 2 F.C.C. 2d at 771-2.) Because of this growth, the Commission for some time has been greatly concerned whether CATV service, which is available only to those persons who are willing and able to pay and who are within reach of the cable facilities,<sup>4</sup> might not adversely affect the maintenance and development of the basic "free" system of television broadcasting, particularly the development of UHF stations, through the loss of audience and advertising which a CATV carrying distant signals can cause.

The Commission first asserted jurisdiction over CATV systems using microwave radio to bring signals from the antenna, requiring such systems to carry local television stations and to avoid duplication of their programs within specified time periods. (See First Report and Order, 38 F.C.C. 683, 30 F.R. 6038.) The purpose of these rules was to avoid unreasonable competitive disadvantage and prejudicial effect upon television broadcast service.

On April 23, 1965, the Commission released a Notice of Inquiry and Notice of Proposed Rule Making in Docket No. 15971, 30 F.R. 6078, 1 F.C.C. 2d 453 (Appendix A hereto), proposing to assert jurisdiction

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<sup>4</sup> It is not economically feasible to extend CATV service to sparsely populated outlying areas.

over all CATV systems, whether or not they use microwave radio to distribute the signals they pick up, and to regulate the entry of CATVs carrying "outside," or distant signals into the major markets. Parties who were urging the adoption of rules to govern CATV pointed to the explosive growth of CATV operations and contended that unregulated CATV growth would, by fragmenting the available audience, endanger both local television service and the development of a nationwide "free" television service utilizing both VHF and UHF channels to provide multiple services in the larger communities with sufficient audience potential to support multiple stations.<sup>5</sup>

The Commission divided the proceeding into two parts. In Part I the Commission announced its tentative conclusion that it has jurisdiction over all CATV systems, whether or not they use radio to carry signals from the receiving antenna, and it proposed to extend the substantive provisions of the rules it had already adopted for microwave-served CATVs to all CATV systems (30 F.R. at 6082-3, 1 F.C.C. 2d at 463-467).

In Part II (30 F.R. at 6083-7, 1 F.C.C. 2d at 467-477), the Commission initiated a rule making inquiry

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<sup>5</sup> By Public Law No. 529, approved July 10, 1962, 76 Stat. 150, 47 U.S.C. § 303(s), Congress, in the so-called all-channel receiver legislation, had authorized the Commission to require all television receivers shipped in interstate commerce, or imported into the United States, to be capable of receiving UHF as well as VHF signals. The major purpose of this legislation was to promote the development of multiple television services nationwide through locally situated UHF outlets. See H. Rept. No. 1559, 87th Cong., 2d Sess., 2-6; S. Rept. No. 1526, 87th Cong., 2d Sess., 2-5.

looking toward possible rule making on the further questions posed by the recent trends in CATV development, including, *inter alia*, the effect upon independent UHF stations of "the mushrooming entry of CATV into major centers of population \* \* \*." 30 F.R. at 6083, 1 F.C.C. 2d at 468. The Commission stated that it needed further information on the probable impact of CATV in the larger population centers before reaching a decision (30 F.R. at 6084-5, 1 F.C.C. 2d at 470-471). It stated (par. 48, 30 F.R. at 6085, 1 F.C.C. 2d at 471):

Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate, comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect.<sup>6</sup>

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<sup>6</sup> These proposals, described in the Notice, 30 F.R. at 6078-6082, 1 F.C.C. 2d at 453-463, included an American Broadcasting Company request that the Commission, "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to



The Commission announced that in the meantime it would grant microwave radio applications to bring CATV into large market areas only on a showing that independent UHF operations would not be threatened (30 F.R. at 6085, 1 F.C.C. 2d at 471). The Commission further requested early comments on an interim policy to be adopted where microwave facilities were not used by the CATV system (30 F.R. at 6085, 1 F.C.C. 2d at 472).

The Commission concluded (pars. 64, 65, 30 F.R. at 6086-6087, 1 F.C.C. 2d at 476-477) by advising all parties that although a further notice would in all likelihood be issued, final rules might be adopted "without conducting new proceedings." It stated:

64. In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. Nor do we mean to restrict comments just to the above areas. Persons may, of course, point up other facets of this overall problem where remedial action may be appropriate (e.g., whether our policies with respect to other auxiliary services, such as translators or satellites, should be modified). The information developed might be useful to the legislative consideration of CATV

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serve other areas except upon prior consent of the Commission," 30 F.R. at 6079, 1 F.C.C. 2d at 457; and a Westinghouse Broadcasting Co. request that, "CATV be limited to those areas outside the overlapping grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station." 30 F.R. 6080-6081. <sup>1</sup> F.C.C. 2d at 460.



and would assist the Commission in making recommendations to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information we do not have a sound basis for specific rule proposals. *However, in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above.* Counter proposals as to possible alternative measures are also invited. We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will in all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission. [Emphasis added.]

65. The inquiry and proposed rulemaking are directed toward all CATV systems. The questions raised by petitioners or indicated by the Commission are pertinent to our responsibilities in licensing microwave facilities for CATV use, whether or not rules governing all CATV systems are ultimately adopted. *Consideration of nonmicrowave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. More-*

*over, we believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. All Commission actions taken during the pendency of this proceeding will, of course, be subject to the outcome of the proceeding and any rules adopted will be made appropriately applicable, such as at license renewal time."* [Emphasis added.]

On March 8, 1966, after receipt of voluminous comments, the Commission released its Second Report and Order in Docket No. 15971, *et al.*, in which it adopted new final rules.<sup>7</sup> (31 F.R. 4540, 2 F.C.C. 2d 725.) (Appendix B hereto.) Upon a comprehensive consideration and discussion of its jurisdiction and the bases of its action, the Commission asserted jurisdiction over all CATVs, made final revised rules requiring the carriage of local television stations and non-duplication of their signals, adopted a new rule providing for hearing procedures to explore the impact of CATV operations in the major markets, and announced that there were certain areas of concern which would be dealt with on an *ad hoc* basis.

The Commission noted that Congress, in the 1962 all-channel receiver legislation, had made the judgment that the widest possible development of UHF is

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<sup>7</sup> On February 15, 1966, the Commission had released a Public Notice in which it announced that new rules would shortly be adopted, to apply to non-microwave-served CATV systems, as well as those using microwave and announcing that February 15th would be the "grandfathering" date.

the best way of achieving an adequate national television service, comprised of a large number of local stations, including both commercial and educational stations, 31 F.R. at 4557, 2 F.C.C. 2d at 770. It believed that since UHF development was already proceeding in at least 163 communities or areas—most of which were located within the top 100 television markets—any halt or curtailment of the growth of UHF development caused by the distribution of signals from other areas in these communities by CATV would be particularly significant. The Commission determined that there should be full exploration, in an evidentiary hearing, of the impact of any new proposed CATV system bringing signals from beyond the Grade B contour of the original station into the Grade A service area of any station in a community in one of the largest one hundred television markets.<sup>6</sup> It stated (par. 121, 31 F.R. at 4558–59, 2 F.C.C. 2d at 773), “The plain fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets”, and concluded (par. 126, 31 F.R. at 4560, 2 F.C.C. 2d at 776):

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<sup>6</sup> A Grade B contour is the imaginary line along which a good picture may be expected for 90 per cent of the time at the best 50 per cent of the locations. The Grade A contour defines the area at the perimeter of which a good picture is received for 90 per cent of the time at the best 70 percent of the locations. See *Clarksburg Publishing Co. v. Federal Communications Commission*, 96 U.S. App. D.C. 211, 215–216 n. 12, 225 F. 2d 511, 515–516 n. 12 (1955).

To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if that growth is of a high order, its impact on UHF development may be most serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and most effective use of radio." In view of these conclusions, we think that our course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "Oh well, so sorry that we didn't look into the matter."

Section 74.1107 of the Rules was adopted to effectuate this determination. (See Appendix C hereto for the text of the pertinent rules.) Subsection (d) of that rule provides that the general prohibition does not apply to any signal which was being supplied by a CATV system to its subscribers on or before February 15, 1966. However, this "grandfather" clause is subject to the proviso that such a CATV system



shall not extend its service into "new geographical areas" if the Commission finds, upon petition filed by a television broadcast station in the area, that such extension of service is contrary to the public interest. The proviso in subsection (d) ends by stating:

The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

The purpose of this provision for relief against the expansion of existing systems was the Commission's belief that an existing CATV system "should [not] be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing)." (31 F.R. at 4563, 2 F.C.C. 2d at 785).

Section 74.1109 contains the procedures applicable to the petitions provided for in Section 74.1107, and further provides for petitions to waive the rules or "to impose additional or different requirements." Section 74.1109 further provides procedures for the grant of temporary relief pending a hearing on a petition.

Although the rule concerning CATV entry into the major markets related only to the extension of a signal beyond the Grade B contour of the originating station, the Commission also directed itself in the



Second Report and Order to the situation where two major markets are so located that the Grade B contour of a station in one already penetrates the other. The Commission recognized that the same problems may exist in such a situation as in the case where there is no such penetration, and it decided to deal with such situations on an *ad hoc basis*. It stated (Second Report and Order, 31 F.R. at 4564 n. 69, 2 F.C.C. 2d at 786 n. 69):

If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.

## 2. *This proceeding*

The San Diego, California, area is the 54th largest television market in the United States. CATV franchises in the San Diego area are held by the petitioners, Mission Cable TV, Inc. (Mission), Pacific Video Cable Co. Inc. (Pacific), and Southwestern Cable Co. (Southwestern),<sup>9</sup> and by two other CATV systems.

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<sup>9</sup> Trans-Video Corp. (Trans-Video) owns Pacific and has a majority interest in Mission.

The petitioners' systems, instituted prior to February 15, 1966, carry the signals of between six and nine Los Angeles television stations into various parts of the San Diego area. San Diego has two VHF television stations (KFMB-TV and KOGO-TV), and one UHF station (KAAR), in operation. A construction permit has been issued for another UHF station, and there is an application on file for a non-commercial UHF educational station. The area is also served with ABC network programs by a VHF station, XETV, across the border in Tijuana, Mexico. If and when the two UHF stations go on the air, San Diego will have a full pattern of service.

Midwest Television, Inc. (Midwest), the licensee of station KFMB-TV, filed a petition with the Commission on March 17, 1966, pursuant to the new rules, requesting immediate temporary and permanent relief from the extension of CATV service into new geographical areas in the San Diego area by the petitioners' CATV systems (R. 1-56). Midwest alleged that none of the areas involved were within the calculated or measured Grade B contours of any of the Los Angeles stations carried except for the northern portion of the city of San Diego; that there had been a recent increasing tempo of CATV line extension activity into new areas within KFMB-TV's Grade A contour; that the expansion of distant-signal service would fragment the audiences of the local San Diego stations; and that even though KFMB-TV and the local UHF station, KAAR, are carried by the CATV systems, their signals are degraded.

Midwest further urged that although some of the Los Angeles stations may provide some Grade B coverage in San Diego, it was undesirable to permit CATVs to import Los Angeles signals into San Diego, because the quality of the Los Angeles signals would be equalized with that of the San Diego stations, to the detriment of the local stations and local San Diego television service. Midwest requested the Commission immediately to restrict carriage of the Los Angeles signals to those geographic areas within which the petitioners' CATV systems were operating on February 15, 1966. Similar permanent relief of this sort was also requested. Midwest filed a supplement to this petition on April 4, 1966, showing the geographic areas served by the CATV systems as of February 15, 1966, and the new areas where service had been instituted since that time (R. 121-144).

In a joint opposition (R. 194-263), Pacific, Mission and Trans-Video alleged that Midwest had failed to show irreparable injury to itself or to the public; that they had not extended signals to new geographic areas; and that the requested temporary relief would injure the respondents and the public. Southwestern, in its opposition (R. 265-328), alleged that its system was not carrying any station beyond its Grade B signals; that its system was "grandfathered" and had not expanded into new areas; that CATV helps UHF; that degradation of KFMB-TV's signal is not a problem; and that irreparable harm would be done to it by a grant of temporary relief. The petitioners also challenged the Commission's authority to grant the requested relief.

In a Memorandum Opinion and Order released July 25, 1966 (R. 577-598) (as corrected by an erratum of July 26, 1966), 4 F.C.C. 2d 612, the Commission found "a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area," so far as the question of the effect of the CATV operations on the growth of UHF was concerned.<sup>10</sup> The Commission sought to maintain the *status quo* by directing petitioners, pending the hearing, not to expand their systems into new areas in which they had not been operating on February 15, 1966, although it specifically permitted the continuation of service to new subscribers obtained since February 15, 1966. The limitations imposed were solely upon the carriage of the Los Angeles stations to new subscribers and did not restrict further expansion *per se*.

Petitioners filed motions to stay the above Commission's stay order pending the determination of this case on the merits. In an Order of August 23, 1966, this Court stayed the Commission's order insofar as the Commission's order prevents petitioners from adding new subscribers to their trunk and feeder lines in existence on August 23, 1966. In all other respects the Commission's order was permitted to stand.

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<sup>10</sup> The question of whether the Grade B contours of the Los Angeles stations reach into San Diego was not determined by the Commission, since the Commission decided that a hearing was needed in any event to resolve the question of the impact of CATV expansion in San Diego. The policy considerations are the same whether or not the Grade B contours of the Los Angeles stations reach San Diego. (Second Report and Order, footnote 69 and paragraphs 113-149, 31 F.R. at 4557-4562, 2 F.C.C. 2d at 770-786).

## QUESTIONS PRESENTED

In the view of respondents the following questions are presented:

1. Whether the Federal Communications Commission has jurisdiction to regulate the importation by a community antenna television system of television signals from another city to insure that such importation will not impair the availability to the public of an equitable allocation of television broadcast service.

2. Whether the Commission has authority to halt the growth of a CATV system pending a full hearing to determine the impact of the system upon television broadcasting and, if so, whether the interim order must be based upon an adjudicatory hearing record.

3. Whether the Commission's rules conflict with the constitutional protection of free speech.

4. Whether the Commission's notice of rule making complied with the requirements of Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 1003(a).

## SUMMARY OF ARGUMENT

## I

The Commission has exercised limited jurisdiction over CATV systems to insure that they will be of value as supplements to the television broadcast service whose signals they use, without destroying the basic allocation of "free" television service. This action was within the jurisdiction conferred upon the Commission by Congress. CATV systems are engaged in communication by wire in interstate commerce, to which the Communications Act is specifically made applicable. They are also a practical



extension of the service of television stations. Therefore, the Commission could make rules to prevent the growth of CATV systems from frustrating the Commission's duty to provide a fair, efficient and equitable allocation of television service to the various communities of the United States.

## II

Since the Commission has authority to make all rules necessary in the execution of its functions and to carry out the provisions of the Communications Act, it could provide by rule for the issuance of orders to limit CATV expansion pending an adjudicatory hearing to determine the impact of CATV service upon the public in a particular community. In this case, the Commission had ample ground for taking such action. It did not act *ex parte*, but only upon consideration of the pleadings and affidavits of the parties. It was not summarily revoking an authority previously granted, and an adjudicatory hearing on the question of the issuance of a stay order was required by neither due process nor statute.

## III

The Commission's rules do not violate the constitutional protection of free speech. The rules constitute a reasonable regulation of the use by CATV systems of radio signals. They do not affect the right of petitioners to originate program material. The narrow regulation involved does not impair any protected right of free speech.

## IV

The Commission's rule making proceeding complied with the notice requirements of Section 4(a) of the Administrative Procedure Act. That statute requires notice only of the subjects and issues involved, and the Commission's notice of rule making advised all parties that one of the subjects involved was the determination of the impact of CATV and the subordinate question of how to limit the growth of CATV pending resolution of the basic impact question. The rules adopted came well within the subject matter and issues proposed in the notice of rule making.

## ARGUMENT

**I. The Communications Act of 1934 gives the Federal Communications Commission the authority it has asserted over community antenna television systems**

The Federal Communications Commission has imposed upon CATV systems the degree of regulation it deemed necessary to insure that CATV service will be of maximum benefit in distributing television signals to the American public and that it will not destroy the basic television service which gives it all its substance. The rules relate only to the use made of television broadcast signals, and they limit that use only for the purpose of maintaining both local "free" television service and CATV service as coordinated components of a nationwide television service. The rules do not limit or affect a CATV system's origination and distribution of its own programs; they do not license CATV systems as television stations are licensed; they do not regulate the fees charged. They

do carry out, "[t]he avowed aim of the Communications Act of 1934 \* \* \* to secure the maximum benefits of radio to all the people of the United States," for, "[t]o that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio." *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943).

The Commission recognized that its jurisdiction was not a question free from doubt. Before it decided the question, it requested the views of all interested persons (Notice of Inquiry and Notice of Proposed Rule Making, 30 F.R. 6078). In the Second Report and Order adopting the new CATV rules, it carefully canvassed and considered these views (pars. 5-19, 31 F.R. 4540-4543, 2 F.C.C. 2d at 726-734), and prepared, in addition, a comprehensive legal memorandum on its jurisdiction (Appendix C to Second Report and Order, 31 F.R. at 4567-4568, 2 F.C.C. 2d at 793-797, Appendix B hereto). In the interest of avoiding needless repetition, we hereby respectfully refer the Court to these discussions as constituting a clear and concise statement of the basis for the Commission's assertion of jurisdiction, and will devote our major effort in this brief to discussing the contentions advanced by the petitioners before this Court.

The Commission's rationale may be summarized as follows:

In the Communications Act of 1934, Congress created the Federal Communications Commission in order to centralize authority in that agency to carry out the Congressional purpose to provide for a com-

prehensive regulation of interstate and foreign commerce in communication by wire and radio. Section 2(a), 47 U.S.C. § 152(a), accordingly states that, "The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, \* \* \*"

Community antenna systems clearly constitute wire communication under Section 3(a) of the Act, 47 U.S.C. § 153(a), which includes "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, \* \* \* including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

Community antenna systems also constitute interstate transmissions under Section 3(c). This is so because the transmission of a television station is in interstate commerce, *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933); *Fisher's Blend Station, Inc. v. State Tax Commission*, 297 U.S. 650 (1936), and the extension of such an interstate communication by a CATV is a part of the interstate transmission, although the extension itself be entirely within one State. *Idaho Microwave, Inc. v. Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965); *California Interstate Telephone Co. v. Federal Communications Commission*, 117 U.S. App. D.C. 255, 328 F. 2d 556 (1964); *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6, 1962), *cert. den.* 371 U.S. 820; *Pacific Telatronics, Inc.*, 4 Pike & Fischer, Radio



Regulation 2d 145 (1964). The community antenna system is a part of the interstate transmission even if it be deemed merely a reception apparatus. *Fisher's Blend Station, Inc. v. State Tax Commission, supra*; *Western Union Tel. Co. v. Foster*, 247 U.S. 105 (1918).

The Commission has authority under section 303(h) of the Act, 47 U.S.C. § 303(h), to "establish areas or zones to be served by any station," and it is commanded by section 307(b), 47 U.S.C. § 307(b), to "make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." The Commission also has broad authority to perform all acts necessary to the execution of its functions. Sections 4(i), 303(r), 47 U.S.C. §§ 154(i), 303(r).

It would be unrealistic to ignore the fact that a community antenna system is in practical effect, as well as in legal contemplation, a part of the transmission of the television signal to the public. *Clarksburg Publishing Co. v. Federal Communications Commission*, 96 U.S. App. D.C. 211, 217, 225 F.2d 511, 517 (1955). This being so, and in recognition of the Commission's "comprehensive powers to promote and realize the vast potentialities of radio," *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943), the Commission has authority to prescribe by rule the conditions under which a television signal may be extended through the medium of a community antenna system, in order to prevent frustration of the



Congressional scheme of television regulation, in particular the mandate of sections 307(b) and 303(s).<sup>11</sup>

In view of these considerations, the Commission held (Second Report and Order, Par. 12, 31 F.R. 4541-4542, 2 F.C.C. 2d at 730):

\* \* \* CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)). Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. [Footnote omitted.]

The petitioners in Case No. 21192 attack the Commission's jurisdiction on several grounds. They assert principally (Br. 15-21) that "the Commission has two principal and separate functions"—to regulate common carriers and to license radio stations—and that since a CATV system is neither a common carrier nor a radio station, its activities are beyond the Commission's concern under the statute. This view, we believe, too narrowly construes the Congressional mandate.

Petitioners do not appear to dispute the proposition that they are engaged in interstate communications.

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<sup>11</sup> This section authorizes the Commission to require all television receivers shipped in interstate commerce to be capable of receiving UHF signals.

And even they must recognize (Br. 16) that the Communications Act in terms states that its provisions, "shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio \* \* \*" Section 2(a), 47 U.S.C. § 152(a). Nowhere in the statute has Congress stated that by "interstate communication by wire" it meant only interstate communication by wire "by a common carrier," and there is no reason to import such language into an Act designed to grant to the new Communications Commission not only a centralization of authority theretofore granted to several agencies but also "granting additional authority with respect to interstate and foreign commerce in wire and radio communication." Section 1, 47 U.S.C. § 151.<sup>12</sup> If Congress had meant only wire communication by common carriers, it would not have referred to "all" interstate communications.

The dichotomy of precise common carrier and radio licensing functions urged by petitioners is not only a concept at odds with the express language of a statute

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<sup>12</sup> This express language of the Communications Act is at odds with petitioners' assertion (Br. 16-17) that so far as wire communications are concerned, the Commission was given only the common carrier jurisdiction previously lodged in the Interstate Commerce Commission, and the committee reports relied upon by petitioners do not so state. What they do state is that so far as the common carrier jurisdiction of the new Communications Commission was concerned, many provisions were taken verbatim from the Interstate Commerce Act.

designed to cover all forms of interstate communication, but is one which the courts have already indicated is not consistent with the statute. Thus, in *Philadelphia Television Broadcasting Co. v. Federal Communications Commission*, — U.S. App. D.C. —, 359 F. 2d 282, 284 (1966), in sustaining the Commission's decision that CATV systems are not common carriers, the Court stated:

\* \* \* Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry.

\* \* \* \* \*

Its [the Commission's] holding that CATV systems are not common carriers thus comes before us in a context of regulation of the CATV systems under different provisions of the Communications Act. In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective. It is the FCC's position that regulating CATV systems as adjuncts of the nation's broadcasting system is a more appropriate avenue for Commission action than the wide range of regulation implicit in the common carrier treatment urged by petitioners.

This seems to us a rational and hence permissible choice by the agency. [Footnote omitted.]

While the Court stated that it was not ruling on the Commission's jurisdiction, petitioners' dichotomy is, we believe, foreclosed by that decision. The United States Court of Appeals for the District of Columbia Circuit has similarly sustained the Commission's decision to examine the impact of CATV operations upon television broadcast service in connection with the grant of a common carrier radio license to serve the CATV system, against the argument that this consideration of competitive effects was to bring "broadcast" regulation into the common carrier field. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 96, 321 F. 2d 359, 362 (1963), *cert. den.* 375 U.S. 951. The Court stated, "It [the Commission] cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must 'make available, so far as possible, to all the people of the United States,' adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 (1958)." <sup>13</sup>

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<sup>13</sup> It is significant that the Court of Appeals, dealing with common carrier regulation in the *Carter Mountain* case, and the Supreme Court, dealing with broadcast regulation in *National Broadcasting Co. v. United States*, 319 U.S. 190, 214 (1943), both referred to Section 1 of the Act which states the Congressional "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at rea-



Since CATV systems extend the service areas of television stations (a matter committed to Commission concern by Section 303(h) of the Act), are in interstate communication under Section 3, and have the capacity to frustrate the fair and efficient allocation of television service which the Commission is commanded by Section 307(b) <sup>14</sup> to achieve, the Commission properly invoked the authority given it by Sections 4(i) and 303(r) to make rules and regulations, not inconsistent with the Act, to carry out its functions and the provisions of the Act.

In a field where Congress "gave the Commission not niggardly but expansive powers," and defined "broad areas for regulation" because it did not wish to "frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency," *National Broadcasting Co. v. United States*, 319 U.S. 190, 219, 220 (1943), petitioners' cramping construction is unreasonable charges: \* \* \* This demonstrates that the Act does not perpetuate narrow and disconnected regulatory concepts, but rather creates a unified mode of regulating all interstate communications under an empirical public interest test.

<sup>14</sup> Petitioners' attempt to denigrate the importance of Section 307(b) and to suggest that it "has nothing to do with the establishment of any communications policy" (Br. 20-21), is difficult to understand. Section 307(b) contains an overriding command, and one which fully authorizes the Commission not only to act upon individual applications, but also to protect future service by allocating channels in advance of immediate demand for them. *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954).



tenable. This was made amply clear by the Supreme Court's decision in *National Broadcasting Co. v. United States*, *supra*, and was again confirmed in its decision in a similar field in *American Trucking Associations v. United States*, 344 U.S. 298 (1953).

In the *American Trucking Associations* case, the Interstate Commerce Commission adopted rules governing the use by motor carriers of leased and interchanged equipment which was otherwise exempt from Commission regulation under the statute. The purpose of the rules, as the Court stated (344 U.S. at 310), "is to protect the industry from practices detrimental to the maintenance of sound transportation services consistent with the regulatory system." Although the leasing practices proscribed by the new rules were nowhere specifically committed to the agency's jurisdiction by the statute, the Court sustained the proscription on the basis of the grant of general rule making power necessary for enforcement of the Act's provisions, recognizing that the specific powers granted would be meaningless without the correlative power to prevent frustration of the Act's purposes. It stated (344 U.S. at 311):

So the rules in question are aimed at conditions which may directly frustrate the success of the regulation undertaken by Congress. Included in the Act as a duty of the Commission is that "[t]o administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration." § 204(a)(6). And this necessary rule-making power, coterminous with

the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation," regulation of which is vested in the Commission by § 202(a). See also § 203(a)(19).

The situation now before this Court is at least as strong for affirmance as that before the Supreme Court in *American Trucking Associations*. An operation which is unquestionably comprehended by the statute as an interstate communication has raised the spectre of frustration of enforcement of the Act, and so may be dealt with under broad rule making powers.<sup>15</sup>

Petitioners urge, finally (Br. 25-30), that the Commission has previously denied that it has jurisdiction over CATV, and that it has unsuccessfully sought to obtain such jurisdiction from Congress. The Commission fully discussed this contention in the Second Report and Order (pars. 16-19, 31 F.R. at 4542-4543, 2 F.C.C. 2d at 732-734, Appendix B *infra*). That discussion makes clear that the Commission had not previously stated in unequivocal terms that it did not have jurisdiction over CATV, and that in any

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<sup>15</sup> That the Commission may deal with interstate communications does not, of course, also signify that it may deal with the manufacture of television receivers or their use by individual members of the public. The "legally significant difference" which petitioners cannot see (Br. 23) seems obvious to us. CATVs communicate and members of the public watching television at home do not. See *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177 (D.C. S.D. N.Y. 1966) *appeal pending* (C.A. 2).

event such a disclaimer would not prevent the Commission from correcting an erroneous ruling. We rely upon that discussion and respectfully refer the Court to it. Only one further comment should be added. The Commission's recent request to Congress to amend the Act did not constitute an admission that jurisdiction over CATV did not exist. As the Commission stated in the Second Report and Order (Par. 153, 31 F.R. at 4564, 2 F.C.C. 2d at 787):

There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. (See notice, par. 31, 1 FCC 2d at p. 465.)<sup>16</sup>

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<sup>16</sup> See also Hearings before the Subcommittee of the Committee on Appropriations, United States Senate, 89th Cong., 2d Sess., on H.R. 14921, p. 1035:

"Senator MAGNUSON. That is the question I wanted to ask. You people honestly feel that you need some congressional reassurance of your authority?

"Mr. HYDE. We think it would be helpful to us.

"Senator MAGNUSON. I do not mean helpful to you. I mean legal authority.

"Mr. HYDE. No, sir.

"Senator MAGNUSON. I am talking legally. Do you need something in addition to what you now have?

"Mr. HYDE. No, sir. We think we are acting within the authority granted to us to regulate interstate communications.

"Senator MAGNUSON. You have the authority?

"Mr. HYDE. We do. But you will remember that the author-

In considering the Commission's request, the House Committee on Interstate and Foreign Commerce reported out H.R. 13286, a bill to amend the Communications Act to give the Commission authority to issue rules and regulations with respect to CATV. H. Rept. No. 1635, on H.R. 13286, 89th Cong., 2d Sess. While the Report specifically refused to agree or disagree with the Commission's conclusions as to its jurisdiction (see p. 9), its significance is that Congress, so far as it has given any indication of its views, has moved to confirm the Commission's power and has, with full knowledge of the exercise of jurisdiction, taken no action to change the Commission's course. The minority views quoted *in extenso* by petitioners have no force, as either authority or legislative history, beyond their inherent power to persuade.

The Commission's rules are consistent with the Act and necessary to its enforcement. For the reasons set forth, we urge that they have been adopted within the confines of the authority granted by Congress.

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ity under which we are acting was granted before there was any such thing as community antenna system, and naturally Congress might very well wish to give us more direction in this area.

"Senator MAGNUSON. Well, it is my understanding—your proposal is for Congress to, if they saw fit, to give you some direction—

"Mr. HYDE. That is right, sir.

"Senator MAGNUSON. Rather than to give you more legal authority.

"Mr. HYDE. We think that we are correct in our assertion of legal authority to act."

## **II. The Commission acted within its statutory authority in directing petitioners to limit the growth of their operations pending the hearing**

The sole argument of petitioner Southwestern, which Mission *et al.* incorporated by reference, is that the Commission exceeded its statutory authority in directing petitioners to limit further expansion of their operation bringing in Los Angeles signals pending the hearing on the impact of CATV in San Diego, because the stay order was not based upon an evidentiary hearing. Southwestern urges specifically that the order is in effect a cease and desist order invalidly issued without compliance with the procedural requirements of Sections 312(b) and (c) of the Communications Act, 47 U.S.C. §§ 312(b) and (c), which, it claims, is the only statutory source of the Commission's power to issue an order of this nature. Petitioner's argument rests upon a mistaken premise, since the Commission's order was not a cease and desist order. The order constituted a valid exercise of the Commission's broad powers under Sections 4(i) and 303(r), 47 U.S.C. §§ 4(i), 303(r), to take all action necessary in the execution of its functions or necessary to carry out the provisions of the Act.

First, it is clear, we believe, that the order was not a cease and desist order issued without the procedural safeguards of Section 312. The Commission did not purport to act on the basis of Section 312 and, contrary to petitioner's suggestion, could not have done so even if it had complied with the procedural requirements of that section. Section 312 authorizes the Commission to issue a cease and desist order in three



specific situations. The section states that an order may issue (47 U.S.C. § 312(b)):

Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

As petitioner concedes (Southwestern Br. 13), the Commission has not found that petitioner's operations are in violation of Section 74.1107 of the Rules, or any other rule or statutory provision. The Commission has assumed that petitioners' systems are within the Grade B contours of the Los Angeles stations (R. 589). Thus, the Commission's order was not, and could not have been, predicated upon Section 312.

Moreover, the cease and desist order provided for in Section 312 is permanent in nature, and enjoins a continuation of past conduct or operations that the person "has" engaged in. The order involved here is temporary, to be in effect pending the hearing.<sup>17</sup> The order does not require a suspension of existing opera-

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<sup>17</sup> In urging that the order should not be considered temporary because the evidentiary hearing may consume a considerable period of time, petitioners point to the fact that the commencement of the hearing, originally scheduled for September 27, 1966, has been postponed to December 6, 1966. But this postponement was granted at petitioners' request. (Docket No. 16786, Tr. 87-88.) In any event, the length of the hearing does not affect the nature of the stay order.

tions; it merely directs petitioners not to acquire new subscribers in certain areas or expand their delivery of Los Angeles signals into new areas pending the hearing. Thus, the Commission's order is not the type of order contemplated by Section 312. It is not a remedy for past misconduct.

The Commission's order has an entirely different basis. The statutory basis asserted by the Commission was as follows (R. 596-597):

\* \* \* we have determined in the second report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in sections 74.1107 and 74.1109 of our rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing; see *Federal Trade Commission v. Dean Foods Co.*, — U.S. —, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority

for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission v. Federal Power Commission*, 327 F. 2d 893, 896-897 (C.A.D.C., 1964). \* \* \*

The questions presented are whether Sections 4(i) and 303(r) of the Act empower the Commission to take action of this nature in aid of the Commission's substantive functions, and whether the procedures followed by the Commission accord with due process.

As we pointed out in Point I, Congress has endowed the Commission in the Communications Act with "expansive" and "comprehensive powers to promote and realize the vast potentialities of radio," *National Broadcasting Co. v. United States*, 319 U.S. 190, 217 (1943), including broad authority to take such action, not inconsistent with the Act or other law, as is necessary in the execution of its functions or to carry out the provisions of the Act. Section 4(i), 47 U.S.C. § 154(i), provides:

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

In addition, Section 303 of the Act, 47 U.S.C. § 303, grants the Commission broad authority to regulate the use of radio as the "public convenience, interest, or

necessity requires," and, upon the basis of this criterion, empowers the Commission to:

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act \* \* \*.

The Commission's determination that it was necessary in the public interest to limit the growth of petitioners' CATV operations pending the hearing rests on compelling considerations. In the Second Report, the Commission had found that serious public interest questions were presented by CATV proposals to bring signals from one major community into another major television market. These questions are: (1) whether a substantial CATV growth in major television markets based upon "outside" signals would preclude the establishment and maintenance of UHF stations in the community or seriously degrade their service to the public, (2) whether such CATV growth would require these stations to face substantial competition of a patently unfair nature which would adversely affect their service to the public, and (3) whether the "sale" of broadcast signals would be used by CATV as an economic base for Pay TV operations, without prior authorization of the Commission or Congress and before resolution of important policy issues as to Pay TV. Second Report and Order, 31 F.R. 4540, 4557-4562, 2 F.C.C. 2d 725, 770-781.

The Commission stressed the seriousness of these questions to the public, and their direct relationship to the Commission's functions in executing the legis-



lative mandate. It pointed out (Second Report and Order, 31 F.R. at 4557, 2 F.C.C. 2d at 770), that "UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation," by which "Congress made the judgment that development of UHF 'is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States' (H. Rept. No. 1559, 87th Cong., 2d Sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 7)." While the legislation "is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for the larger cities" (Second Report and Order, 31 F.R. at 4557, 2 F.C.C. 2d at 771), the Commission concluded that the legislative goal might be thwarted if CATV operations in the larger cities should grow to substantial proportions, explaining (Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 774):

The new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12- or 20-channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50 percent or over), the UHF stations might face a very difficult hurdle. The audience for non-network stations is limited (about a 10-percent share in most markets in the prime time) and this limited audience might be greatly reduced



since very substantial numbers of people interested in viewing the nonnetwork programming would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of commonsense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive nonnetwork programming. \* \* \* As pointed out, the nonduplication provision would afford virtually no relief, since nonnetwork programming is not distributed on anything like a simultaneous nationwide basis. \* \* \* Finally, we point out that it is not just a matter of causing the demise of the independent UHF station; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest "in the larger and more effective use of radio" (Communications Act, sec. 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50-to-85-percent figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting.

The Commission was also especially concerned about the present special competitive situation under which CATV operates under one set of rules for program acquisition and the broadcaster under an entirely different set (Second Report and Order, 31 F.R. at 4560-4562, 2 F.C.C. 2d at 778-781). Whereas a television station normally obtains the right to exhibit non-network programs by outright payments to program

suppliers and usually secures the exclusive right to exhibit the programs within a particular geographic area and for a particular length of time, a CATV system presently stands outside the program distribution process.<sup>18</sup> The CATV system does not pay program suppliers for its programs or bid against the broadcaster for distribution rights, nor does it respect the exclusivity for which the broadcaster has bargained and paid. Concerning the effect of this double standard on the UHF independent station, the Commission stated (Second Report and Order, 31 F.R. at 4561, 2 F.C.C 2d at 779) :

Procuring attractive programming which will interest viewers is, of course, the most vital concern of the new UHF independents. For example, such stations may bid for and obtain exclusive rights to an attractive film package. No other station in the same market could show these films—but a CATV system, which never entered the bidding, might well bring in these same films from a distant market. If the CATV reaches very significant proportions—50 percent or more, the result is the loss of the exclusive rights for which so much was paid and upon which so much may have been staked. And here we stress again that without the financial sustenance from entertainment programs, a

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<sup>18</sup> See *United Artists Television, Inc., v. Fortnightly Corporation*, 255 F. Supp. 177 (D.C. S.D.N.Y., 1966), *appeal pending*, (C.A. 2), holding that CATVs are fully liable for copyright infringement. This decision is pending on appeal in the Second Circuit. Moreover, Congress is currently considering amendments to the Copyright Law which would make CATV liable for copyright infringement, in whole or in part. H. Rept. No. 2237, 89th Cong., 2d Sess., pp. 77-88.

station has no adequate economic base to serve as an outlet for local expression for all the people in its service area.

For this further reason, the Commission concluded that if CATV growth in metropolitan areas should be substantial, "the result might be most serious for the new UHF independents in these same areas" (Second Report and Order, 31 F.R. at 4560, 2 F.C.C. 2d at 778).

The possibility that CATV competition may destroy or seriously degrade television broadcast service to the public, without itself thereafter rendering the required service, is a matter that the Commission has "not only the power but the duty" to consider in administering the Communications Act. *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 349, 258 F. 2d 440, 443 (1958); *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475-476 (1940). In both the Second Report and in the First Report, the Commission emphasized the fact that CATV is not an adequate substitute for local broadcast service and that it would be inconsistent with the Commission's statutory responsibilities to permit CATV to destroy television service. In the First Report the Commission stated (First Report, 38 F.C.C. 683, 699):

The distribution of multiple reception services through CATV cannot be permitted to curtail the viability of existing local service or to inhibit the growth of potential service by new broadcast facilities. Because of the prohibitive

cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to all people of the United States, on a fair, efficient, and equitable basis (secs. 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically, cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

See also the Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 775.

In addition to its practical shortcomings, CATV does not normally serve as an outlet for local self-expression or present programming tailored to local needs. Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 775. The Commission's allocation of television facilities pursuant to Sections 303 and 307(b) of the Act is predicated upon the "desirability of having a large number of local outlets with diversity of control over disseminating sources rather than a few stations serving vast areas and populations" (First Report, 38 F.C.C. at 699-700). It has long



rejected the premise that channel assignments should be clustered in major cities from which satellite communities within an appropriate range would obtain service rather than having broadcast facilities of their own (First Report, 38 F.C.C. at 700).

Thus, if the effect of CATV operations in a major community were to be the substitution for local independent stations of independents from the very largest cities like New York or Los Angeles, this would not only be "contrary to sound allocation principles, long established in section 307(b) of the Act," Second Report and Order, 31 F.R. at 4559, 2 F.C.C. 2d at 775, but also a "clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia [or San Diego] additional broadcast stations to meet the 'important needs' for 'local programming and self-expression'." H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 4.<sup>19</sup> [Matter in brackets added.]

In sum, there was ample warrant for the Commission's concern in the Second Report and Order that the questions posed by CATV operations in major

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<sup>19</sup> In addition, as pointed out above, the Commission was also properly concerned that a form of Pay TV might result from substantial CATV growth in the larger cities ("which would naturally be the backbone of any wire pay-TV operations") without prior authorization of the Commission or Congress and before the resolution of important policy issues (Second Report and Order, 31 F.R. at 4560, 2 F.C.C. 2d at 777). Since 1955 the Commission has been conducting proceedings to determine whether the authorization of broadcast subscription television (or Pay TV) is in the public interest. See Notice of Proposed Rule Making and Notice of Inquiry, in Docket No. 11279, 31 F.R. 5136, 3 F.C.C. 2d 1.



markets are serious, involving threatened harm to the public and frustration of Congressional goals. The Commission properly concluded that its statutory duties required it to explore these questions thoroughly in evidentiary hearings and to authorize proposed "outside signal" CATV operations in major markets only upon a hearing record giving reasonable assurance that the public would not be harmed and that achievement of the purposes of the Act would not be thwarted. This is one of those situations where the public interest requires that conditions conducive to a sound future "be assured rather than left uncertain." *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241 (1945).

The Commission deemed it essential to examine these serious questions before proposed CATV operations in major markets become established or well-entrenched. It pointed out (Second Report and Order, 31 F.R. at 4562, 2 F.C.C. 2d at 781-782):

The basic thrust of congressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303 (h), (g), (r) and (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consist-

ent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

See also Memorandum Opinion and Order of May 25, 1966, 3 F.C.C. 2d 816, 819-820.

Accordingly, the Commission adopted a rule of general applicability (Section 74.1107) staying all new "distant signals" CATV operations in major markets pending evidentiary hearing where it is clear that signals are being distributed beyond their normal Grade B area. It also determined to take up case-by-case the situation where there are two distinct major markets but where a CATV system in one market carrying the signals of stations in the other market may not, because of the closeness of the markets, be extending the signals beyond the Grade B contour. (Second Report and Order, 31 F.R. at 4564, fn. 69, 2 F.C.C. 2d at 786, fn. 69). The problem of halting the growth of existing operations was also one calling for "case-by-case judgment in the particular community as to the feasibility of such action and the appropriate geographical area or areas." Second Report and Order, 31 F.R. at 4563, 2 F.C.C. 2d at 785. The Commission provided for consideration of these situations upon petition under Section 74.1109, pursuant to pleading procedures which would permit af-

feeted persons to be heard on the particular circumstances.

After consideration of the pleadings and affidavits of the parties, the Commission concluded that this was a classic case for evidentiary hearing on the public interest questions posed by the expansion of petitioners' systems throughout the San Diego area, and a case falling squarely within the policy of the Second Report and Order (R. 587). It was undisputed, the Commission found (R. 587-88, 592), that there was considerable UHF activity underway in San Diego, that petitioners' systems had commenced operations only recently, and that while these systems then had relatively few subscribers, they had the potential to expand throughout San Diego County under franchises covering an area where approximately 90 percent of all the homes within the Grade A contour of the San Diego stations are located.

In further concluding that interim relief appropriately limiting further expansion pending the hearing was necessary, the Commission stated (R. 588):

Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief

appropriately limiting further expansion until resolution of the public interest issues is called for.

Thus, contrary to the assertion of petitioner Mission (Br. 11-15), the Commission's conclusion that it was essential to halt the growth of petitioners' systems pending the evidentiary hearing clearly rests on adequate findings that this action was necessary to avoid threatened irreparable injury to the public.

In contending that Sections 4(i) and 303(r) of the Communications Act do not empower the Commission to take the action found necessary here, Southwestern attempts (Br. 24) to dismiss Section 4(i) as a mere housekeeping provision related to the conduct of the Commission's internal affairs, and urges that some specific statutory authorization like Section 312 is required. But these arguments run counter to settled law.

The Supreme Court has held that Section 4(i), like 303(r), grants "general rule making power" sufficient to sustain the Commission's multiple ownership rules limiting the number of broadcast licenses issued to any one licensee, stating (*United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-203 (1956)):

The challenged rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rule making authority. 47 U.S.C. Sec. 154(i) and Sec. 303(r) grant general rulemaking power not inconsistent with the Act or law.

The contention that explicit statutory authorization is required was also rejected in *National Broadcast-*



*ing Company v. United States*, 319 U.S. 190, 218-220 (1943), where the Court stated:

True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. \* \* \* While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

Provisions similar to Sections 4(i) and 303(r) in other statutes have likewise been construed to grant broad power "coterminus with the scope of agency regulation," which does not depend upon a specific reference in the act. *American Trucking Associations v. United States*, 344 U.S. 298, 309-311 (1953); *Public Service Commission of the State of New York v.*



*Federal Power Commission*, 117 U.S. App. D.C. 195, 198-199, 327 F. 2d 393, 896-897 (1964). In the *Public Service Commission* case, the Court stated with respect to Section 16 of the Natural Gas Act, a provision very similar to Sections 4(i) and 303(r) of the Communications Act <sup>20</sup> (117 U.S. App. D.C. at 199, 327 F. 2d at 897) :

All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail. \* \* \*

Nor is there merit to petitioner's further contention that the power to issue a temporary stay of further operations pending a hearing is a special power that cannot derive from general authority, at least in the absence of a prior evidentiary hearing. The cases upon which petitioner principally relies in support of this proposition, *Standard Airlines, Inc. v. Civil Aeronautics Board*, 85 U.S. App. D.C. 29, 177 F. 2d 18 (1949), and *Trans-Pacific Freight Conf. of Japan v. Federal Maritime Board*, 112 U.S. App.

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<sup>20</sup> Section 16 of the Natural Gas Act, 15 U.S.C. 717(o), provides in part: "The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter \* \* \*."

D.C. 290, 302 F. 2d 875 (1962), involved a kind of action which is clearly distinguishable from the action taken by the Commission here.<sup>21</sup>

In the first place, both of those cases involved a summary suspension of activities previously approved by the agency, rather than a stay of planned operations not yet in being pending a determination as to whether they should be authorized. Thus, in *Standard Airlines* the Civil Aeronautics Board sought to suspend without hearing an air carrier's authority, evidenced by a "Letter of Registration" issued by the Board, pending a proceeding to revoke the registration. The problem before the Court revolved about

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<sup>21</sup> Petitioner's reliance (Southwestern Br. 15-16) upon a dictum in *Regents v. Carroll*, 338 U.S. 586, 598-599 (1950) is misplaced. In that case, the Commission found, after a hearing, that the public interest would not be served by a renewal of station license because the licensee's contract with a third person jeopardized its financial ability to operate in the public interest. The licensee thereafter breached its contract in order to obtain a renewal of license. The question before the Supreme Court was whether the Commission's action was a valid defense to a state court action for breach of contract under state law, and the Court held that the Commission's powers were limited to licensing and did not include the power to immunize a breach of contract with a third person not subject to the Act. The statement quoted by petitioner was directed to that situation, and clearly was not meant to indicate that the Commission's powers are limited to licensing in all situations, since the Act itself grants the Commission specific authority in many respects other than licensing. See, e.g., Section 303 of the Act, 47 U.S.C. § 303. We are not contending, of course, that the Commission has any authority except that conferred by the Communications Act, or that it has any inherent power to impose sanctions, but rather that the authority conferred by Sections 4(i) and 303(r) includes the power to take the action found necessary here.

the "statutory and constitutional rights of one who has a substantial property investment acquired in dependence upon a Government permit" (85 U.S. App. D.C. at 31, 177 F. 2d at 20). The Court held that the "Government cannot make a business dependent upon a permit" (*Ibid.*) and then condition the authority granted upon suspension without hearing.

Similarly, in *Trans-Pacific* the Maritime Board sought summarily to "prohibit one party (in what is at this stage essentially a private dispute) from enforcing an agreement, previously approved by the Board, made with another private party," pending a final determination as to complaints against the first party (112 U.S. App. D.C. at 295, 302 F. 2d at 880). In holding that Sections 22 and 15 of the Shipping Act (46 U.S.C. §§ 821 and 814) did not authorize interim injunctive relief of this nature because the Board had not made the findings required by those sections, the Court reserved decision on the question of the Board's power to issue an "order prohibiting the parties from carrying out an *unapproved* agreement," stating 112 U.S. App. D.C. at 294, fn. 8, 302 F. 2d at 879, fn. 8):

We need not express a view as to whether such an order is within the Board's authority. But we do note that different considerations might well be involved in such a case.

This fundamental distinction between stopping an activity previously authorized by the agency and declining to permit the commencement of activities not yet authorized by the agency or found to be in the

public interest, is reflected throughout the Communications Act. Thus, the Act requires the Commission to accord a full hearing before a station license or construction permit may be revoked (47 U.S.C. § 312) or modified by the Commission (47 U.S.C. § 316), or before any person can be ordered to cease and desist from conduct alleged to violate a license, the Commission's rules, or the Act. (47 U.S.C. §§ 312(b) and (c)). Under these sections, a shorter procedure is permitted only "where safety of life or property is involved" (*ibid.*). The Act similarly requires a hearing before any order suspending a radio operator's license for past misconduct can take effect (47 U.S.C. § 303(m)). The Act further provides that pending any hearing on an application for renewal of license, "the Commission shall continue such license in effect" (47 U.S.C. § 307(d)).

The same Congressional concern that activities previously authorized by an agency not be suspended pending a final determination as to their continued authorization is reflected in Section 9(b) of the Administrative Procedure Act, 5 U.S.C. § 1008(b), which provides that where a licensee has made timely and sufficient application for renewal of license, "no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

However, the Act is also clear that where public interest questions are present, operations may not be commenced prior to hearing. As the Commission pointed out (Second Report and Order, 31 F.R. at



4562, 2 F.C.C. 2d at 781-782), the "basic thrust of Congressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop." Thus, under Sections 301 and 309 of the Act, 47 U.S.C. §§ 301 and 309, public interest questions must be resolved in hearing before the Commission can authorize radio station operations which it has not previously authorized, and before such operations can commence. No person has a right to operate until that hearing has been held.<sup>22</sup>

The legislative concern that the Commission's resolution of public interest questions in initial licensing take place before any entrenchment occurs is also the basis for Section 319(a) of the Act, 47 U.S.C. § 319(a), which prohibits the issuance of a license for the operation of any station unless a permit for its construction has been granted by the Commission. The intent of Congress was to avoid pressure upon the Commission stemming from premature construction and expenditures.<sup>23</sup> This Congressional purpose

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<sup>22</sup> The Act permits an exception to this requirement only for a temporary period, and upon a Commission finding that "there are extraordinary circumstances requiring emergency operations in the public interest" (47 U.S.C. § 309(f)).

<sup>23</sup> A statutory provision similar to Section 319(a) was first enacted as Section 21 of the Radio Act of 1927. For the original legislative intent, see, e.g., 64 Cong. Rec. 2793; H. Rept. No. 1416, 67th Cong., 4th Sess., p 4; Hearings Before the Senate Committee on Interstate Commerce on S. 1 and S. 1754, 69th Cong., 1st Sess., p. 117.



was more recently reiterated in the process of amending Section 319 of the Communications Act. The House Committee on Interstate and Foreign Commerce, in submitting House Report No. 417, 83rd Cong., 1st Sess., on H.R. 4557 (May 13, 1953), stated (pp. 1-2):

The statutory requirement that a construction permit must first be secured for any radio station for whose operation a license is applied for is based upon the congressional intent of keeping the Federal Communications Commission free from the pressure which might otherwise be exerted by an applicant for a radio-station license who has made considerable expenditures towards construction of a station without having previously obtained an authorization for its construction. It appears that this consideration applies primarily to broadcast facilities which require costly land installations for which building sites must be acquired, and for which special buildings and special transmitting equipment must be constructed. Once these investments have been made, they are difficult to liquidate. Under these conditions, the Commission might be reluctant to refuse a license once such expenditures have been made by the applicant.

The Commission's order here falls into the category of prohibiting expenditures and growth until all of the significant public interest questions are resolved. The order does not require a cessation of existing operations or preclude petitioners from serving any subscriber acquired up to the date of that

order (R. 593).<sup>24</sup> It is directed solely toward the expansion of petitioners' operations (insofar as Los Angeles signals are concerned) into new areas pending the hearing on the public interest questions presented. Accordingly, the Commission's action carries out the basic scheme of the Communications Act and is fully consistent with *Standard Airlines* and *Trans-Pacific*.

A second distinction between those cases and this one is the nature of the competing public and private interests involved. Even where existing operations are affected, an agency may be able to take temporary injunctive action pending hearing. *R. A. Holman Co., Inc. v. Securities and Exchange Commission*, 112 U.S. App. D.C. 43, 299 F. 2d 127 (1962), *cert. denied* 370 U.S. 911. In the *Holman* case, in order to protect the securities-purchasing public, the SEC suspended, pending a hearing, a broker dealer's exemption from the need to register certain securities. The Court rejected the assumption that a hearing was required prior to the taking of agency action of that sort, and sustained the SEC's action on the basis of

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<sup>24</sup> While the order specifies boundaries existing on February 15, 1966, it permits petitioners to continue service to any persons requesting service between that date and the date of the Commission's order (R. 593). Moreover, under the Court's order of 1966, petitioners may continue to make drops and deliver Los Angeles signals to all subscribers on lines constructed as of the date of the Court's order. Since the Commission has no desire to cause a disruption of existing service, and does not consider such action necessary or practical on a temporary basis, it would not alter this situation pending the outcome of the hearing in the event of an affirmance.

its broad general powers, stating (112 U.S. App. D.C. at 47, 299 F. 2d at 131) :

In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing.

The Court distinguished its prior decisions in *Standard Airlines* and similar cases on the ground that they "involved different competing interests," in that no serious harm to the public was threatened in *Standard Airlines* and the injury to the appellant was far more serious (112 U.S. App. D.C. at 48, fn. 9, 299 F. 2d at 132, fn. 9).<sup>25</sup> It should be noted in this connection that in *Trans-Pacific* the Court relied especially on the fact that the Maritime Board made no public interest finding of "detriment [to] the commerce of the United States," but found rather that only the private "complainants were threatened with irreparable injury" (112 U.S. App. D.C. at 294, 302 F. 2d at 879).

We have already demonstrated at some length (*supra*, pp. 43-46), the basis for the Commission's conclusion that it was necessary to halt the growth of petitioners' operations pending the hearing, to

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<sup>25</sup> Indeed, even in *Standard Airlines* the Court had recognized that: "the important theoretical aspects of governmental power and the restrictions upon such power are not the whole of the necessary consideration. There are practical aspects also. The facts depict the necessities, whether for the exercise of power or for the restraint of it. It is upon the pattern of practicalities that this case must be studied and decided." 85 U.S. App. D.C. at 31, 177 F. 2d at 20.

avoid threatened harm to the public of a serious nature. The Commission also weighed the impact on petitioners and found no injury substantial enough to overcome the possible adverse consequences to the public (R. 596-98, 592-93). In this connection, the Commission stated (R. 592-93):

It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers, and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwestern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the second report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a rollback is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.



While the Commission found that petitioners had made no showing of irreparable injury, it specifically provided that "if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration" (R. 598). Considering the potential irreparable injury to the public, this balancing of the competing interests was clearly reasonable and should not be disturbed by this Court.

Accordingly, we submit that this case is akin to *Holman* and falls within its long-recognized doctrine that "where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing" (112 U.S. App. D.C. at 47, 229 F. 2d at 131).

Finally, notwithstanding petitioner's suggestion that the Commission acted without notice and hearing, it should be noted that the Commission's order was not issued summarily, but rather in accordance with the procedures prescribed in Section 74.1109 of its rules, which afforded petitioners notice and an opportunity to be heard. (See Appendix C hereto.) Section 74.1109 provides that a petition filed under that section "shall be accompanied by an affidavit of service on any CATV system \* \* \* who may be directly affected if the relief requested in the petition should be granted" (subsection (b)). Subsection (c)(1) requires that the petition "state fully and precisely all pertinent facts and considerations relied upon to



demonstrate that a grant of such relief would serve the public interest” and requires further that “Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.” Subsection (d) provides for the filing of oppositions to the substance of the petition, similarly supported, and subsection (g) provides a separate opportunity to be heard expeditiously on any request for temporary relief. Subsection (g) states:

Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within 10 days and reply comments within 7 days thereafter. The Commission will expedite its consideration of the question of temporary relief.

Petitioners fully availed themselves of their opportunity to be heard under Section 74.1109 and, in addition, filed a number of other pleadings and motions (R. 577-78, fn. 1). The Commission considered the factual showing and legal arguments made by petitioners at some length in its opinion (R. 581-584, 588-589, 592, 596-598). It concluded that the ultimate questions presented by the request for permanent relief and petitioners' opposition could not be resolved upon the basis of the pleadings, and designated these matters for evidentiary hearing. As the Commission pointed out (R. 587-588, 592), the salient factors upon which it relied in concluding that this was a classic case calling for evidentiary hearing and temporary

relief under the policy of the Second Report and Order were not denied by petitioners.<sup>26</sup>

Petitioners do not now point to any evidence or argument which they were precluded from adducing or which they would have made in any more extensive hearing on the question of temporary relief. Their contention is rather that the Commission was required to accord them a different sort of hearing, with an opportunity to adduce evidence and argument orally, as a matter of statutory and constitutional right. But this contention, as we have demonstrated, is not supported by the cases relied upon. In the absence of any express provision in the Communications Act requiring oral argument or evidentiary hearing, the Commission has discretion under its general procedural authorization in Section 4(j) to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice" 47 U.S.C. § 154(j).<sup>27</sup>

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<sup>26</sup> There was no dispute as to the considerable UHF activity in the San Diego area, the relatively small nature of petitioners' existing operations, the geographical areas and boundaries of such operations, or petitioners' potential for expanding throughout San Diego County under CATV franchises covering approximately 90 percent of the homes within the Grade A contour of the San Diego stations (R. 587-588, 592).

<sup>27</sup> In *Federal Communications Commission v. WJR*, 337 U.S. 265 (1949), the Supreme Court rejected the view that the Constitution requires oral argument in all cases, holding that the "right of oral argument as a matter of procedural due process varies from case to case in accordance with differing circumstances, as do other procedural regulations" (337 U.S. at 276). The Supreme Court further held that Congress has "committed to the Commission's discretion," by the general procedural authorization in § 4(j), the "questions whether and under what circumstances it will allow or require oral argument, except where the Act itself expressly requires it" (337 U.S. at 281).

On the constitutional question, it bears noting that *Standard Airlines* does not support petitioner's claim that a full-scale hearing would be constitutionally required even for an order of the type involved in that case. The Court stated (85 U.S. App. D.C. at 31-32, 177 F. 2d at 20-21):<sup>28</sup>

We do not mean to say that for suspension purposes the Board need grant a full-scale hearing such as it might conduct in a revocation proceeding. The nature and extent of the hearing may be appropriate to the action being considered.

In view of all the foregoing, we submit that in ordering a partial and temporary halt to the growth of petitioner's operations pending the hearing, the Commission acted well within its broad powers under Sections 4(i) and 303(r) of the Communications Act, consistent with the scheme of the Act and judicial precedent, and accorded petitioners due process. Pertinent here is the admonition of the Supreme Court in *United States v. Storer Broadcasting Company*, 351 U.S. 192, 203 (1956):

The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation. The growing complexity of our economy induced the Congress to place regulation of businesses like communication in

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<sup>28</sup> While the Court went on to state in *Standard Airlines* that oral argument was necessary, citing its decision in *WJR v. Federal Communications Commission*, 84 U.S. App. D.C. 1, 174 F. 2d 226 (1948), the *WJR* case was shortly thereafter reversed on this point by the Supreme Court, *Federal Communications Commission v. WJR*, 337 U.S. 265 (1949).

specialized agencies with broad powers. Courts are slow to interfere with their conclusions when reconcilable with statutory directions. [Footnote omitted.]

### III. The Commission's order did not infringe upon the constitutional protection of free speech

Petitioners *Mission, et al.*, contend in Case No. 21192 (Br. 30-45) that the Commission's "top 100 market" rules violate the Constitutional protection of free speech.<sup>29</sup> While we agree with much of what petitioners say with respect to the general application of the First Amendment, we believe that the particular claim made here has been essentially foreclosed by the Supreme Court in *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

In the *National Broadcasting Co.* case, the Supreme Court made clear that reasonable regulation of the use of the radio spectrum in the interest of the general public is not a violation of the First Amendment.

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<sup>29</sup> Petitioners seek to attack not only that part of the rules governing the importation of distant signals into San Diego, but also the carriage and non-duplication requirements of the rules (Section 74.1103, 31 F.R. at 4571), which govern the CATV system's relationship with local television stations. However, these requirements are not involved in the order under review. If petitioners believe those aspects of the rules also to be in violation of the First Amendment, their remedy is to seek review of the rule making. In any event, similar carriage and non-duplication requirements have already been adjudged not to be in conflict with the First Amendment. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. den.* 375 U.S. 951; *Idaho Microwave, Inc. v. Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965).



That case sustained regulations adopted by the Commission to regulate the relationship between radio stations and networks. The Court took account of the chaos which orderly regulation had supplanted and found that, "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio," and did so in such a manner as to "preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.'" (319 U.S. at 217). The Court concluded that (319 U.S. at 227):

\* \* \* The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

If, as we urge in Point I, *supra*, the Commission has been granted the authority by Congress to limit the extension of television broadcast signals into new areas by CATV, the *National Broadcasting Co.* case makes clear that such a limitation raises no substantial free speech question. For the regulation at issue here is merely another aspect of regulation of use of the air waves. CATV systems constitute a part of the



scheme of television distribution which, unlike any other mode of expression, make use of radio signals as a *sine qua non* of their operation.<sup>30</sup>

As the Court of Appeals for the District of Columbia Circuit stated in 1955:

The Commission will presumably assert jurisdiction to regulate community antenna systems if and when it concludes that such systems provide or are adjuncts of a broadcast service. Its failure thus far to assert such jurisdiction, standing by itself, cannot support a conclusion that the systems are not service within the meaning of the rule. It is unrealistic to overlook the fact that, through the community systems, Clarksburg residents are receiving and are, in a sense, being served by the programs of the Wheeling station. \* \* \* (*Clarksburg Publishing Co. v. Federal Communications Commission*, 96 U.S. App. D.C. 211, 217, 225 F. 2d 511, 517 (1955).)<sup>31</sup>

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<sup>30</sup> Thus, the logic of the Commission's position does not, as petitioners suggest (Br. 37), reach other modes of expression which compete with television but which use radio facilities only incidentally. To sustain the Commission here is not to hold that the Commission could inhibit competition from newspapers by the expedient of denying them radio or wire facilities to transmit news. A similar argument pressing limited regulation of a special situation to a supposed logical conclusion, was made and rejected in *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. den.* 375 U.S. 951.

<sup>31</sup> As set forth in Point I, *supra*, CATV systems, although physically located within a single state, nevertheless operate in interstate commerce. Sections 3(a) and (b) of the Communications Act, 47 U.S.C. §§ 3(a), (b); *Idaho Microwave, Inc. v. Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965); *California Interstate Telephone Co. v.*

Thus, the Commission's effort to preserve local television by regulating CATVs has the same constitutional status under the First Amendment as regulation of the transmission of signals by the originating television stations. It is irrelevant to the Congressional power that the CATV systems do not themselves use the air waves in their distribution systems. The crucial consideration is that they do use radio signals and that they have a unique impact upon, and relationship with, the television broadcast service. Indiscriminate CATV development, feeding upon the broadcast service, is capable of destroying large parts of it.

Petitioners also suggest, without apparent relevance to this free speech issue, that consideration by the Commission of the effects of CATV competition upon television service is improper. Their reliance (Br. 38-40) in this regard upon *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), is totally misplaced. While Congress did not subject broadcasting to a public utility type regulation, it also did not remove the effects of

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*Federal Communications Commission*, 117 U.S. App. D.C. 255, 328 F. 2d 556 (1964); *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6, 1962), *cert. den.* 371 U.S. 820; *Pacific Telatronics, Inc.*, 4 Pike & Fischer, Radio Regulation 2d 145 (1964).

A community antenna system is a part of the interstate transmission even if it were to be deemed merely a reception apparatus. *Fisher's Blend Station v. The Tax Commission*, 297 U.S. 650 (1936); *Western Union Telegraph Co. v. Foster*, 247 U.S. 105 (1918). However, it is also clear that CATVs are not merely passive receivers. See *United Artists Television, Inc. v. Fortnightly Corporation*, 255 F. Supp. 177 (D.C., S.D.N.Y., 1966), *appeal pending* (C.A. 2).

competition from Commission consideration, as the *Sanders Brothers* case makes amply clear. The Supreme Court held that economic injury *per se* to an existing station is not a ground for denying a new application, but it also held that the question of the effect of competition upon the public is a matter for Commission consideration (309 U.S. at 475-476). The Court stated (309 U.S. at 475-476):

This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. \* \* \*

See also *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958).<sup>32</sup> Thus, the Commission's treatment

<sup>32</sup> See also *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954), sustaining the Commission's power to allocate television channels to communities throughout the United States by general rule making. The Court specifically rejected the argument petitioners

of competition by CATV is in accord with traditional standards in the radio field, standards which have not been thought to raise any free speech question.

Petitioners recognize (Br. 35) that the free speech argument has already been rejected where the Commission has denied a radio license to a common carrier seeking it for the sole purpose of serving a CATV whose operation threatened the viability of the only local television station, and which had not agreed to carry the local station and refrain from duplicating its programs. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 116 U.S. App. D.C. 93, 321 F. 2d 359 (1963), *cert. den.* 375 U.S. 951; *Idaho Microwave, Inc. v. Federal Communications Commission*, 122 U.S. App. D.C. 253, 352 F. 2d 729 (1965). The situation presented here, although it concerns the direct regulation of the CATV systems, rather than the grant of a radio license to serve a CATV, is indistinguishable from the standpoint of the impact of the First Amendment. In both cases what is involved is reasonable regulation of the use of the airwaves in the public interest.

It is important to point out, in conclusion, that the Commission's rules contain no restrictions of any sort on petitioners' right to originate their own programs. No expression by petitioners is involved. Petitioners are restricted only in the use they make of signals broadcast by others. *Weaver v. Jordan*, 49 Cal. Rep. 537, 411 P. 2d 289 (1966), *cert. den.* 35 Law Week  
 apparently make here (Br. 40-42), i.e., that the Commission cannot restrict competition by considering the needs of a community for which there is no immediate application.



3126 (Pet. Br. 32-33), is therefore not in point. In that case the Supreme Court of California struck down, as inconsistent with the First Amendment, an absolute prohibition against the origination of programs by a wire Pay-TV system, and the Court emphasized that its holding was based upon the sweeping nature of the prohibition. That decision, in our view, was carefully drafted so as not to prohibit the kind of limited regulation embodied in the Commission's CATV rules.

In sum, the regulation of the air waves is an exercise of the commerce power, *Federal Radio Commission v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 279 (1933), and Congress may subject their use to reasonable regulation in the public interest,<sup>33</sup> whether the use of radio signals be made by radio and television stations or by CATV systems. Such regulation which, as we have shown above in Point I, is reasonably related to valid objectives, is not an infringement upon the rights of free speech of either the CATV system operator or the viewing public.

#### **IV. The Commission gave adequate notice of the provisions for hearing and temporary stay adopted in Section 74.1109**

Petitioners Mission *et al.* urge in Point V of their brief (pp. 46-53) that Section 74.1109 of the Commission's rules, 47 CFR 74.1109, under which the

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<sup>33</sup> With respect to the use of the airwaves by television stations, it has been said that, "Television and radio are affected with a public interest: the Nation allows its air waves to be used as a matter of privilege rather than of right." *Television Corporation of Michigan v. Federal Communications Commission*, 111 U.S. App. D.C. 101, 104-105, 294 F. 2d 730, 733-734 (1961).



Commission ordered a hearing on the impact of CATV in San Diego and determined to maintain the *status quo* pending that hearing, was illegally adopted because of a failure to give the notice required by Section 4(a) of the Administrative Procedure Act, 5 U.S.C. § 1003(a). We believe it to be readily demonstrable that the rule making proceeding fully apprised all interested parties of "the subjects and issues involved" in compliance with the Administrative Procedure Act and, indeed, advised them of the substance of the rule finally adopted.

It should be noted at the outset that Section 4(a) does not require notice of the terms or the substance of a proposed rule, but rather "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Thus, the agency need not publish in advance the precise rule finally adopted, or all of the possibilities for resolving the issues. *Willapoint Oysters, Inc. v. Ewing*, 174 F. 2d 676, 684-685 (C.A. 9, 1949), *cert. den.* 338 U.S. 860; *Wilson & Co. v. United States*, 335 F. 2d 788 (C.A. 7, 1964), *cert. den.* 380 U.S. 951; *Logansport Broadcasting Corp. v. United States*, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954). And, in its final action, it may properly take account of further proposals submitted to it in the course of the proceeding. *Owensboro on the Air, Inc. v. United States*, 104 U.S. App. D.C. 391, 262 F. 2d 702 (1959), *cert. den.* 360 U.S. 911. As petitioners recognize (Br. 46), what is required is that the notice of rule making "fairly apprise interested persons of the issues involved, so that they may present relevant data or argument." H. Rept. No.

1980, 79th Cong., 2d Sess., p. 24; S. Rept. No. 752, 79th Cong., 1st Sess., p. 14. The Commission's proceeding fully met this standard.

Petitioners' complaint is that the Notice of Inquiry and Notice of Proposed Rule Making adopted April 22, 1965 (30 F.R. 6078, 1 F.C.C. 2d 453) gave no hint (Br. 47) that the Commission was proposing a rule which would permit it to order a hearing on the impact of CATV in San Diego and to accompany the hearing order with an order maintaining the *status quo* on CATV development pending the outcome of the hearing. But this argument ignores the fact that one of the basic issues set forth (at considerable length) in the April 1965 Notice was the potentially harmful effect upon "free" local television, and particularly the effect upon independent (non-network) UHF stations, of "the mushrooming entry of CATV into major centers of population" (par. 39, 30 F.R. at 6083, 1 F.C.C. 2d at 468). The Commission extensively discussed the issues involved in CATV operation "in areas with potential for independent stations," pointing out that "Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by three network services from nearby communities" (par. 48, 30 F.R. at 6085, 1 F.C.C. 2d at 471).<sup>34</sup>

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<sup>34</sup> San Diego has VHF Channels 8 and 10, and UHF Channels 15, 39 and 51 assigned to it by Section 73.606 of the Commission's Rules, 47 CFR 73.606. Channel 15 is reserved for non-commercial educational use.

The Commission requested comments not only on the general problem, but also on the specific proposals of certain petitioners for rule making, whose proposals were set forth in the Notice. These proposals included a request that the Commission "adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the station's signals to serve other areas except upon prior consent of the Commission \* \* \*" (par. 10, 30 F.R. at 6079, 1 F.C.C. 2d at 457); a request to "stay immediately the commencement of operations by CATV's in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final regulations to this effect," for the asserted reason that "once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas," (par. 22, 30 F.R. at 6081, 1 F.C.C. 2d at 462); and a request that the Commission "put on notice persons who now operate or who propose to operate CATV systems that CATV operations, whether or not microwave relay is used, will be subject to regulation, and *that some CATV systems may be required to modify or cut back their operations*" (par. 24, 30 F.R. at 6082, 1 F.C.C. 2d at 463). [Emphasis added.]

In the Notice, the Commission recognized that it lacked sufficient information to gauge the impact of CATV entry into the large markets (par. 45-48, 30 F.R. at 6084-6085, 1 F.C.C. 2d at 470-471), and asked for comments on the proposals already submitted

(par. 48) and counterproposals as to alternative measures (par. 64, 30 F.R. at 6086-6087, 1 F.C.C. 2d at 476). It stated (par. 64) that while it expected to conduct further rule making proceedings, "in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above. Counter proposals as to alternative measures are also invited." It also "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." (Par. 65, 30 F.R. at 6087, 1 F.C.C. 2d at 477.)

In par. 67 of the Notice <sup>35</sup> (30 F.R. at 6087, 1 F.C.C. 2d at 477) the Commission requested early comments on two phases of the proceeding: (1) Part I of the rule making, dealing with the assumption of jurisdiction over non-microwave CATV systems and the application to them of the rules on carriage and non-duplication of local stations (par. 27-36, 30 F.R. at 6082-6083, 1 F.C.C. 2d at 463-467); and (2) par. 50 of Part II, which paragraph proposed interim action

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<sup>35</sup> Par. 67 reads in full, "All interested persons are invited to file written comments on the rule amendments proposed in part I, and on par. 50, on or before June 25, 1965, and reply comments on or before July 26, 1965. Comments on the inquiry and proposed rulemaking in part II may be filed on or before August 27, 1965, with reply comments due on or before October 25, 1965. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited by this notice."



to deal with the problem of "proposed large-scale CATV operations in major cities with burgeoning UHF independent development" while the full proceeding was pending (30 F.R. at 6085, 1 F.C.C. 2d at 471-472). Comments on the remainder of Part II, dealing with the large-market and other questions (30 F.R. at 6083-6087, 1 F.C.C. 2d at 467-476), were to be submitted some two months later.

Paragraph 49 of the Notice had stated that while the rule making was underway, applications to use microwave radio to serve CATV systems in the larger communities would not be granted without "a full and clear showing" that independent UHF service would not be threatened. In par. 50 the Commission requested comments on interim action where a CATV in a large market did not use radio facilities. It stated (30 F.R. at 6085, 1 F.C.C. 2d at 472) :

Since the matter is of such short-term nature (i.e., pending resolution of the proceedings), the shorter time period for comments and reply comments applicable to part I of the notice shall govern, and we will reach an early determination (see par. 30). In order to be in a position to take definitive action, if appropriate, we specifically invite comment on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its Grade B contour into a community with the situation described above (par. 49), without there having been a clear and compelling show-



ing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community). \* \* \*

In sum, the Commission proposed new rules to regulate or limit CATV entry into the larger markets, and also specifically proposed early action to maintain the *status quo* until final rules were adopted. Voluminous comments were received on both the interim proposal and the final rules. Midwest Television, Inc., the licensee of station KFMB-TV, on Channel 8 in San Diego, in commenting on the interim procedures,<sup>36</sup> asked for an immediate stay of CATV activity, with particular reference to San Diego, which it termed a "critical situation" of rapid CATV growth. It asked the Commission to take immediate "interim action to keep the situation from getting out of hand while it proceeds to consider final and comprehensive regulations to govern CATV," and urged that the interim rule be made applicable to existing systems, again with specific reference to San Diego.<sup>37</sup>

The Association of Maximum Service Telecasters, Inc., in its comments on Part I and par. 50 of Part II, filed July 26, 1965, also requested prompt interim controls on the expansion of CATV activity, including limitations upon existing systems, and further suggested summary procedures to handle requests for different treatment than that provided in the rules. It stated (par. 109):

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<sup>36</sup> Midwest also filed comments in Part II, to which Trans-Video Corp., filed a reply.

<sup>37</sup> Excerpts from the Midwest comments, filed July 26, 1965, are set forth in Appendix D hereto.

The Commission should adopt a specific rule providing for summary, non-hearing, procedures to handle claims for exceptions from any particular provision of the CATV rules and to handle requests for other or different treatment than is provided for in the rules, including the carriage, non-duplication and interim UHF rules. Such procedures would, for example, allow a party to whom the rules directly apply to seek a special exception from the rules or other special relief upon a showing of special circumstances or conditions justifying such treatment and would allow any other party affected by the rules to obtain an exception or special relief upon a similar showing.<sup>38</sup>

As AMST further pointed out in its comments (Appendix C hereto, p. 146), the Commission had made a specific rule making proposal to this effect, including proposed special procedures for granting temporary relief pending evidentiary hearing, in a notice issued at an earlier stage in the proceedings prior to the First Report. Notice of Further Proposed Rule Making, FCC 63-1128, 28 F.R. 13789, 13791, 13792. While these proposed special procedures were not adopted in the Commission's First Report and Order, the Commission did "not terminate these proceedings by this First Report and Order," but "instead [held] them open for final action in conjunction with our action" on the concurrently issued rule making notice

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<sup>38</sup>This general portion of these comments is set forth in Appendix E hereto. We note in this connection that AMST was urging in these particular comments only the adoption of a rule to prohibit the extension of a signal beyond its Grade B contour.

of April 22, 1965, discussed above. First Report and Order, 30 F.R. 6038, 6040, 38 F.C.C. 683, 687, Notice of Inquiry and Notice of Proposed Rule Making, 30 F.R. 6078, 6082, 1 F.C.C. 2d 453, 465.

In its comments on Part II, filed September 27, 1965, AMST again urged a rule limiting CATVs from extending the signals of television stations beyond their Grade B contour, and went on to state (par. 76, 77) that provision should be made for a special showing by a television station that a CATV system should not carry stations whose Grade B contours reach the community.<sup>39</sup>

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<sup>39</sup> "Just as provision should be made for a special showing that an exception to the proposed rule is warranted, so, too, provision should be made for a special showing by an affected television station that the circumstances are such that a CATV system should be precluded from carrying stations whose Grade B contours encompass the community in question. For example, the community could be close to several stations which provide off-the-air service and be separated by a ridge of mountains from the outside stations even though theoretically their Grade B contours encompass the community. Or, for example, the community in question could be receiving marginal Grade B service from stations located in a distant city and be part of the metropolitan area of or otherwise closely located and tied to another city in which television stations are located. In such situations and other situations where the importation of the outside signal by CATV could be shown to significantly change an existing pattern of local and area television service, provision should exist for special relief.

Accordingly, the Commission should, by rule, provide for summary, non-hearing procedures to handle claims for exceptions to any particular provision of the distant station rule and to handle requests for other or different treatment than is provided for in the rule. Such procedure would allow a CATV proponent or affected station to seek an exception or other special relief upon a showing of circumstances or conditions justifying such treatment. There should be adequate notice to

In sum, the Notice was in complete compliance with the notice requirements of the Administrative Procedure Act. The issues propounded in the Notice were how to deal with the growth of CATV in the large markets, and how to maintain the *status quo* until the broader policy decisions could be reached. These were the same issues resolved in the rules. And it can make no difference that the Commission determined to resolve the basic issue through individual, adjudicatory hearings rather than through further rule making, or that it utilized a "final" rule to maintain the *status quo*<sup>40</sup> pending the hearings instead of an "interim" rule. Further, AMST filed a proposal for a rule to provide for exactly the relief

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interested parties but the procedure should be summary in nature and should be confined to written submissions by the parties concerned, except where the Commission concludes that more is required in any particular situation. Burdensome and time-consuming evidentiary hearings on these matters as a matter of course are not necessary to provide relief where relief would be appropriate."

<sup>40</sup>The Commission had contemplated adoption of a rule (set out in par. 50), designed to maintain the *status quo* until a further substantive rule (in Part II) could be fashioned delineating the expansion of CATV into areas where new UHF development of an independent (non-network) nature was or would be commencing. After examination of the comments, it concluded that it was not feasible, on the materials before it, to make the critical judgment as to impact of CATV on UHF development in these areas, and therefore determined upon a policy of holding adjudicatory hearings to obtain the critical facts. But it adopted the exact type of rule which it had proposed in par. 50, in order to maintain the *status quo* pending the outcome of these hearings. For clearly such a rule, whether labelled "interim" or "final" (and it would of necessity be a final rule in a legal sense), is necessary if the Commission were to be in a position to make the public interest

provided for, and granted, in this case, under Section 74.1109, 47 CFR 74.1109. Petitioners, who do not claim to have lacked knowledge of the proposals made by Midwest and AMST, had adequate opportunity to address themselves, as did the other parties, to the issues which the rules resolve.

#### CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Memorandum Opinion and Order of the Federal Communications Commission should be affirmed.

Respectfully submitted,

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NOVEMBER 1, 1966.

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judgment. Paragraph 3 of the Second Report and Order, 31 F.R. at 4540, 2 F.C.C. 2d at 726, in a sense is thus inaccurate in stating that only Part I and par. 50 of Part II were being dealt with, but correctly characterizes the essence of what was done.



## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ROBERT D. HADL,  
*Counsel.*

RESPONDENTS' APPENDIX

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In the United States Court of Appeals  
for the Ninth Circuit

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No. 21183

SOUTHWESTERN CABLE CO., PETITIONER

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNI-  
CATIONS COMMISSION, RESPONDENTS; JACK O. GROSS,  
ET AL., INTERVENORS

---

No. 21192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO.  
AND TRANS-VIDEO CORP., PETITIONERS

*v.*

UNITED STATES OF AMERICA AND FEDERAL COMMUNI-  
CATIONS COMMISSION, RESPONDENTS; JACK O. GROSS,  
ET AL., INTERVENORS

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ON PETITION FOR REVIEW OF A MEMORANDUM OPINION AND  
ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION

---

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(i)





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PETITION FOR REVIEW OF A MEMORANDUM OPINION AND  
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**RESPONDENTS' APPENDIX**

(1)



## APPENDIX A

### ICE OF INQUIRY AND NOTICE OF PROPOSED RULE MAKING

DOCKET NO. 15971, 1 F.C.C. 2D 453

(3)

NOTICE OF INQUIRY AND PROPOSED RULEMAKING RE ALL CATV SYSTEMS, DOCKET NO. 15971:

Requests that the Commission assert jurisdiction of TV signals by CATV and promulgate rules and regulations governing such distribution; grant in part.

Inquiry and rulemaking directed toward all CATV systems; institute

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

<p>In the Matter of AMENDMENT OF PARTS 21, 74 (PROPOSED SUB- PART J), AND 91 TO ADOPT RULES AND REGU- LATIONS RELATING TO THE DISTRIBUTION OF TELEVISION BROADCAST SIGNALS BY COM- MUNITY ANTENNA TELEVISION SYSTEMS, AND RELATED MATTERS</p>	}	<p>Docket No. 15 (RM Nos. 636, 637, 742, 755, and 766)</p>
---	---	--

NOTICE OF INQUIRY  
and  
NOTICE OF PROPOSED RULEMAKING

(Adopted April 22, 1965)

BY THE COMMISSION: COMMISSIONERS BARTLEY AND LOEVINGER CONCURRING IN PART AND DISSENTING IN PART AND ISSUING STATEMENTS

1. Notice is hereby given of inquiry and proposed rulemaking in the above-entitled matter.

2. The Commission has received a number of requests that it assert jurisdiction over the distribution of television broadcast signals by community antenna television systems (CATV's) and promulgate rules and regulations governing such distribution. Many of the requests were made informally in comments on the rulemaking dockets Nos. 14895 and 15233 with respect to the licensing of microwave facilities used to relay television signals to CATV systems.<sup>1</sup> In addition, five formal petitions have been filed.<sup>2</sup>

3. (a) On October 16, 1964, the American Broadcasting Co. (ABC) filed a "petition for Commission regulation of the carriage of television signals by Community Antenna Television Systems," requesting the Commission to promulgate rules establishing areas and zones to be served by television stations and limiting the use of

<sup>1</sup> The following specifically requested that the Commission assume jurisdiction over CATV's: Aroostook Broadcasting Corp., Association for Competitive Television, Channel Seven, Inc., and WLUC TV. Other parties filing comments indicated that they held the same views.

<sup>2</sup> Similar petitions have also been received from Capital Cities Broadcasting Co. (RM 755, filed on Apr. 7, 1965) and Taft Broadcasting Co. (RM-766, filed on Apr. 1965). Any further petitions of this nature will be placed in this docket and treated as comments.

ions' signals beyond such areas and zones (RM No. 672). Various pleadings in support of, or opposition to, the ABC petition have been submitted, and ABC has filed a reply; (b) on December 18, 1964, Springfield Television Broadcasting Corp. (Springfield), filed a "request for declaratory ruling" that all CATV systems, whether utilizing microwave facilities or acquiring television signals off-the-air, are subject to the Commission's jurisdiction and required to comply with operating provisions similar to those proposed in docket Nos. 14895 and 15233; (c) on January 22, 1965, Boise Valley Broadcasters, Inc., licensee of station KBOI-TV, Boise, Idaho (Boise), filed a "petition for interim relief," requesting the Commission to assume complete jurisdiction over all CATV systems and impose a "freeze" on all microwave applications for CATV use pending the promulgation of rules governing all CATV systems; (d) on February 12, 1965, Westinghouse Broadcasting Co., Inc., filed a "petition for consolidation of proceedings and assertion of jurisdiction over Community Antenna Television Systems," requesting the Commission to institute rulemaking governing all CATV systems, consolidate that proceeding with dockets Nos. 14895 and 15233, and stay immediately operations by CATV's in those areas which now or in the near future will be served by three commercial television stations pending the adoption of final regulations; (e) on March 10, 1965, the Association of Maximum Service Telecasters, Inc. (AMST), filed a "petition of Association of Maximum Service Telecasters, Inc., for rulemaking" (RM-742), calling for the immediate exercise of regulatory authority by the Commission over all CATV systems and the adoption of comprehensive rules of general applicability.<sup>2a</sup> The stated bases of the five petitions are summarized below.

1. (a) *The ABC petition.*—ABC petitions the Commission to regulate the distribution of television signals by CATV systems on the ground that such action is essential to our ability to discharge our statutory responsibilities and within the Commission's present authority. ABC urges that the present and likely future trend of CATV development threatens to undercut the discharge of our statutory responsibilities "to make available, so far as possible, to all the people of the United States a rapid, efficient, nationwide, and worldwide wire and radio communication service" (sec. 1 of the Communications Act, 47 U.S.C. 151), equitably apportioned "among the several States and communities" (sec. 307(b), 47 U.S.C. 307(b)).

2. In support of the claim of increasing CATV impact upon Commission and statutory policies, ABC points to major changes in CATV operations since the Commission's 1959 report and order in docket No. 1443, "In the Matter of an Inquiry into the Impact of Community Antenna Systems, TV Translators, TV 'Satellite' Stations, and TV Repeaters on the Orderly Development of Television Broadcasting," F.C.C. 403, 18 Pike & Fischer, R.R. 1573. According to ABC, the number of CATV systems has grown from approximately 550, serving an estimated 1,500,000 viewers, to approximately 1,300 CATV systems

<sup>2a</sup>Thirteen dissenting members of AMST have filed comments expressing a contrary position.



serving over 4 million viewers. Moreover, CATV franchises, sought or granted, have been running at the rate of one a day during the last 10 months, in 345 communities in 40 States. Whereas the number of channels offered to CATV subscribers was typically three in 1959, the emphasis now is on broadband systems with a capacity for 11 or 12 channels. In 1959, CATV operations were largely confined to small, or fairly small markets; today there are plans to extend New York City stations to substantial communities many miles away in upstate New York and Pennsylvania. Predicting that the next step will be for CATV to bring New York City independent stations into major cities like Boston, Philadelphia, Baltimore, and Washington, ABC expresses fear that this might lead to combined CATV and pay-TV operations which would siphon off top attractions from free TV.

6. Before summarizing the further bases for ABC's claim of adverse impact, we note in this connection that two UHF permittees in Philadelphia have expressed concern over the effect of pending CATV applications for franchises in that city. William Fox, permittee of a new UHF station, WIBF-TV, which expects to commence operation in Philadelphia in mid-1965, filed a statement supporting the ABC petition and commented *inter alia* as follows:

As set forth in the ABC petition, there are now several applications pending for CATV franchises in Philadelphia. The successful operation of UHF station WIBF-TV in Philadelphia, which now has three operating VHF stations, will be dependent on its ability to bring outstanding programming now available to the Philadelphia audience and on adequate protection of this programming from uncontrolled carriage of signals from other markets by CATV systems serving Philadelphia. Unregulated carriage of television signals by CATV systems in Philadelphia will prevent implementation of the Commission's basic television allocation policy which looks toward the operation of UHF and VHF stations in intermixed markets throughout the United States.

In addition, ABC points out that the permittee of UHF station WPHL-TV, which has suspended operation in Philadelphia but plans to go back on the air in mid-1965, wrote a syndicated film supplier on December 10, 1964, as follows:

As you may know, a great deal of CATV activity has emerged in Philadelphia and vicinity. Rollins Broadcasting has just been granted an exclusive franchise for Wilmington, Del. Jerrold Electronics has applied for Camden, N.J.; and more than a half dozen applicants are seeking franchises for Philadelphia, including Triangle, Storer, the Bulletin Co., etc. If the proposed systems would be operating within our principal coverage area, their main offering is to be the programming of WNEW-TV, WOR-TV, and WPIX. The New York indies may represent damaging competition to Philadelphia UHF stations should their programming be admitted to this market. We, therefore, must ask that any film purchase permit WPHL-TV option for cancellation, without penalty, in the event the same film shows are available from New York indies via local cable systems. I am sure you will understand that this measure is a necessity.

7. The ABC petition notes further that the enactment of the all-channel receiver law in 1962 (76 Stat. 150, 151) has committed Congress and the Commission to a long-range television plan in which the expanded use of UHF will be paramount, and asserts that unregulated CATV poses a substantial threat to UHF development. By way of example, ABC notes that a Binghamton, N.Y., UHF station, in operation

tion since 1957, has recently advised the Commission that UHF service would terminate there (leaving the city with one VHF station in place of one VHF and two UHF) if CATV were permitted to bring in four New York City independent stations. ABC also points to applications for CATV franchises in a number of Connecticut towns where UHF channels are either in use or allocated, noting that the CATV's propose to bring in New York City stations as well as others. ABC further lists 70 communities with UHF allocations where CATV franchises were sought between August 21 and November 26, 1964, and 95 communities with UHF allocations where CATV franchises were granted during the same period.

8. In addition to the impact on UHF, ABC urges that unregulated CATV has had, and will have, substantial adverse effect on service by local television stations, since the splitting of audience resulting from multiplicity of additional signals brought in by CATV inevitably causes the station to lose audience and advertising revenues. ABC claims that the rulemaking in dockets Nos. 14895 and 15233 is wholly inadequate to insure that local television service can survive effectively, and that CATV cannot be an adequate substitute for local television broadcast service for three reasons: "First, CATV systems do not serve the public living in the sparsely populated areas that, because of low-population density, are considered uneconomical for cable systems to reach; second, CATV systems do not serve those who, though within the wired-up areas, cannot afford the subscription fee; and third, CATV systems do not provide the benefits of a locally originated television service, available to all without a charge, benefits which are important to the continued welfare of our political, economic, and social systems."

9. In sum, ABC states, the present and prospective trend of CATV growth poses a threat to the kind of local television service now enjoyed by a great many communities throughout the country and fostered by the Commission for many years. It asserts that if CATV systems of the type now being proposed in many major markets of the country come into being, carrying a dozen or more channels, the ability of stations now serving these markets to provide local service will be substantially impaired and UHF stations scheduled to go on the air in these markets may never get off the ground." Fundamentally at stake, according to ABC, is the question of whether CATV is to be permitted to rework the basic framework of the established broadcasting system from a multiplicity of local stations into a nationwide distribution of signals from major metropolitan centers like New York, Chicago, and Los Angeles. If this were to become the objective of national communications policy, contrary to longstanding Commission and congressional views as to the public interest, more efficient and satisfactory means than CATV distribution could be devised, such as space satellites.<sup>3</sup>

<sup>3</sup> ABC points out that the National Association of Broadcasters expressed a similar concern about the trend of CATV in its comments in docket Nos. 14895 and 15233 as follows:

"If multiple-signal choices were to be the prime objective of communications policy in the United States, as developed by Congress and the Commission, it would have been a rather simple matter to provide for satellites scattered throughout the country, interconnected with New York and Los Angeles. By this means, every community would

10. While taking the position that the Commission's general powers under the Communications Act include authority to prevent persons other than licensees from causing an undue burden on interstate commerce in conflict with the basic purpose of the act and the responsibilities of the Commission,<sup>4</sup> ABC invokes particularly the specific authority conferred by section 303(h) to "establish areas or zones to be served by any station" (47 U.S.C. 303(h)). It requests the Commission to propose and adopt rules which would define the areas and zones normally to be served by television stations and prohibit the use of the stations' signals to serve other areas except upon prior consent of the Commission or in accordance with established regulations defining the basis upon which the signal could be extended beyond its normal service area of the station.<sup>5</sup> ABC urges that the power to determine the areas or zones to be served by any station necessarily includes the correlative power to make these determinations effective against nonlicensees pursuant to the provisions of sections 4(i), 303(b), 312(b), and 502 of the Communications Act. It notes that these sections do not in terms restrict the Commission's authority to the imposition of limitations on licensees themselves, and that explicit authority to deal with specific practices is not required. *National Broadcasting Company v. United States*, 319 U.S. 190, 218-21; *American Trucking Association v. United States*, 344 U.S. 298, 303-312; *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138; *United States v. Pennsylvania R. Co.*, 323 U.S. 612. And, finally, ABC requests the Commission to exercise this authority promptly to prevent imminent frustration of the development and growth of local services through the uncontrolled use of station signals by CATV systems.

11. (b) *The Springfield request for declaratory ruling.*—Springfield, the licensee of UHF station WRLP (channel 32) in Greenfield, Mass.,<sup>6</sup> requests a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction on the ground that there is an immediate and urgent need for the Commission not only to assert jurisdiction over all CATV systems but also to provide provisional relief from unfair and prejudicial competition to local stations by off-the-air

receive several television signals. But the Congress and the Commission have declared otherwise; that a paramount objective of television broadcasting is to provide each community with at least one local facility.

"If the microwave complex is permitted to relay signals over long distances, an advertiser will soon find that he can secure wide coverage simply by buying a few stations in large metropolitan areas. Nonduplication prohibitions would not remedy this condition. The proliferation of distant signals will result in curtailed buying of local markets by advertisers, which in turn will soon exert economic pressure on countless local outlets with a corresponding depressing influence upon the ability to program locally.

"Accordingly, we submit that the Commission should extend its consideration of microwave applications to include factors beyond simple nonduplication restrictions. It should examine and evaluate the effect the extension of a station's signal far beyond its designated service area would have on overall allocation policies."

<sup>4</sup> ABC notes that the National Community Television Association has taken the position before the Connecticut Public Utilities Commission that "a community antenna television system is directly concerned with television broadcasting" and that "the matter of protection of local television stations" lies in a "sensitive area of regulation which the Federal Government has wholly preempted."

<sup>5</sup> ABC also requests the Commission to issue a policy statement to the effect that local stations, not broadcasters, should be preferred in the issuance of CATV franchises in their communities.

<sup>6</sup> Springfield is also the licensee of UHF stations in Springfield and Worcester, Mass., and the licensee of a UHF facility in Dayton, Ohio. Previously, on July 29, 1961, Springfield filed a petition for rulemaking (RM 636), to establish technical standards for CATV operations. This petition, and comments already received, will be placed in the docket for further comment.



TV systems. Using its own situation as an example, Springfield states that the number of CATV systems in competition with WRLP has grown from 9 in 1957 to over 20 at present. These CATV systems bring into the WRLP service area television signals from such distant places as Albany, Schenectady, Utica, and New York, N.Y.; Poland Spring, Maine; Manchester and Durham, N.H.; Boston, Mass.; and New Haven and Hartford, Conn. Since only one of the CATV systems uses microwave, the rulemaking in dockets Nos. 14895 and 15233 afford WRLP little relief. Springfield has been unable to reach a satisfactory arrangement with the off-the-air CATV's concerning carriage and nonduplication of the WRLP signal, and, because declining revenues, has been forced to discontinue local program origination on WRLP.

2. Springfield predicates Commission jurisdiction on the theory that CATV systems, in receiving and distributing television signals by wire to the public, are engaged in interstate communication by wire within the purview of sections 2(a) and 3(a) of the Communications Act. Section 2(a) states that the provisions of the act "apply to all interstate and foreign communication by wire or radio," and section 3(a) defines "communication by wire" as the "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, or delivery of communications) incidental to such transmission." Springfield asserts that CATV systems are an integral part or connecting link in the dissemination of television signals between the originating facility and the viewing public, and hence are incidental to interstate transmission. For, while the CATV systems themselves are usually located within one community within one State, it is established that the television signals intermediately received, forwarded, and delivered by the CATV are interstate commerce.

3. Like ABC, Springfield finds ample basis for Commission jurisdiction over all CATV systems in sections 4(i), 303, and 307(b) of the Communications Act and the principles laid down in cases such as *National Broadcasting*, *American Trucking*, and *Pennsylvania R.* in upholding a regulatory agency's use of the broad powers conferred in its enabling statute to protect the integrity of the regulatory scheme.<sup>7</sup> It requests the Commission to issue a declaratory ruling that all CATV systems are subject to the Commission's jurisdiction and to impose interim operating provisions similar to those adopted in dockets Nos. 14895 and 15233. Springfield claims that prompt action is essential to the success of the all-channel law and expanded use of UHF in small and medium size markets, as the rapid expansion of unregulated off-the-air CATV systems is inhibiting investor interest in UHF television and may permanently stunt growth of UHF. Asserting further that relief accorded only after lengthy proceedings would come too late, Springfield states that

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Springfield also cites *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177; *Houston, East and West Texas Railway Co. v. United States*, 234 U.S. 342.

interim provisions are required during the pendency of final rule-making and, being "procedural" in nature, could be imposed summarily.

14. (c) *The Boise petition for interim relief.*—Boise, the licensee of station KBOI-TV in Boise, Idaho, states that it has also filed a petition to deny pending applications for microwave facilities which would relay signals of four stations in Salt Lake City, Utah (approximately 250 miles from Boise), to CATV systems in two communities within KBOI-TV's grade A contour. Conceding that the remedy there requested would be adequate for its own immediate purposes, Boise says that concern over the broader interests of the public has compelled it also to file the instant petition affirmatively supporting ABC's request and presenting additional considerations.

15. Boise states that by allowing CATV to operate uncontrolled, the Commission is, to a considerable extent, abdicating its responsibilities under section 315 (political broadcasts), 317 (sponsorship identification), and 310 (citizen control requirements) of the Communications Act, as well as under its own "fairness doctrine" (controversial issues), enunciated in "Report on Editorializing by Broadcast Licensees," docket No. 8516, 13 FCC 1246, and policies against undue concentration of control of communications media (multiple ownership rules). It urges that these provisions were enacted by Congress or promulgated by the Commission to ensure that the public receives an equal presentation by legally qualified candidates for public office and a fair presentation of controversial issues, is advised of the origin of advertising claims, and is secure in the knowledge that the material it receives has been distributed over facilities controlled and operated by U.S. citizens, with diversification of ownership. To the intent of Congress to protect the viewing public in these respects, it tends to all viewers, and it "is unrealistic to overlook the fact that through the community systems" the subscribing members of the public "are receiving and are, in a sense, being served by the program of the originating station." *Clarksburg Publishing Co. v. Federal Communications Commission*, 255 F. 2d 511, 517 (C.A.D.C.). CATV operators determine what their subscribers shall view, and being free of all regulation, need not be citizens, can achieve unlimited concentration of control, may censor, advertise without sponsorship identification, and ignore the "fairness doctrine" and equal-time requirements for political broadcasts.

16. Boise accordingly urges that Commission jurisdiction over CATV is necessary to achieve the purposes of sections 310, 315, and 317 of the Communications Act, as well as to effectuate the Commission's fairness and diversification policies, and can validly be asserted under the doctrine of *American Trucking Association v. United States*, 344 U.S. 298. Alternatively, in the event that the Commission decides against asserting jurisdiction on the basis of its present authority, Boise seeks the imposition of a freeze on all microwave grants for CATV use, or at least those which would extend station signals more than 100 miles from the transmitter, to protect the integrity of the table of assignments pending the enactment of legislation in this field and the finalization of administrative rules. It further suggests that



translator stations and CATV systems should be accorded like treatment by the Commission, i.e., that translators should not be barred from obtaining microwave facilities if they are made available for CATV use and that the rebroadcast permission required for translators under section 325(a) of the Communications Act should similarly apply to CATV operations.

17. (d) *The Westinghouse petition.*—Westinghouse<sup>8</sup> petitions the Commission to exercise plenary jurisdiction over all CATV systems, institute a new factfinding and rulemaking proceeding directed to all phases of CATV concern, and consolidate the proceedings in dockets Nos. 14895 and 15233, docket No. 15415 (with respect to CATV ownership by broadcast licensees), and RM 672 (the ABC petition).<sup>9</sup> Specifically, Westinghouse recommends that CATV be limited to those areas outside the overlapping grade A contours of three or more commercial television broadcast stations, except where it seeks only to provide better reception of local signals in poor reception pockets, and also that CATV be barred for a reasonable period from entering any two-station market where a construction permit has been secured for a third station.

18. Taking the position that CATV in its original role as an extension of service to inadequately served areas is a necessary and desirable adjunct of television broadcasting, Westinghouse states that the principal cause for alarm today is the altered direction of present CATV growth into larger and larger markets—many with three or more existing stations. It points, inter alia, to the six pending applications for CATV franchises in Philadelphia (noting that one of the applicants has announced his intention to spend approximately \$40 million in the development of a Philadelphia system); to the contract signed by Mohawk Valley Community Antenna for installation of a CATV system with 60,000 possible connections; and to the award of a CATV franchise for the suburban Philadelphia community of Upper Darby which is intended to be “the nucleus of CATV systems to serve many additional areas in the Delaware Valley.” Westinghouse predicts that within the next 3 months applications for CATV franchises will be filed in every major city of the country, and that the final step in the development of CATV will be a national CATV “network” making all the channels of New York, Los Angeles, and perhaps other major cities available from coast to coast.

19. In the view of Westinghouse, the rapid and unregulated growth of CATV in this direction endangers the Commission’s blueprint for television service, as set forth in the sixth report and order, and will frustrate Commission policy with regard to UHF. It has been established, Westinghouse claims, that UHF stations have a much better chance of success in the major metropolitan areas where the oppor-

<sup>8</sup> Westinghouse bases its interest in this matter on its position as a licensee of television stations in Boston, Baltimore, Pittsburgh, Cleveland, and San Francisco, and on the fact that a CATV microwave common carrier and four CATV systems are owned by its parent corporation, Westinghouse Electric Corp. Westinghouse also asserts an interest on the basis of its status as an independent program producer and distributor.

<sup>9</sup> A “motion in support of petition for consolidation of proceedings and a opposition to assertion of jurisdiction over Community Antenna Television Systems,” filed by National Community Television Association Inc., on Feb. 19, 1965, apparently also seeks consolidation of docket No. 15586.

tunity for broad advertising support exists. Because of the all-channel receiver legislation, the growth of UHF might be stabilized by the promise of steadily increasing audiences but for investor uncertainty about the trend of CATV. Westinghouse states that if allowed unrestricted growth, CATV will almost certainly impede the development of new stations in markets otherwise capable of supporting them.

20. Westinghouse further states that CATV entry into the larger markets will undoubtedly have an adverse effect upon much of the independent programming now presented by stations in those markets, and on Westinghouse's own activities as an independent programming source. In keeping with the Commission's policy of fostering diversity of programming sources, Westinghouse has actively endeavored to develop independent programming, such as the "PM East and PM West" series, the "Mike Douglas" show, "The Steve Allen Show," the "CBS War" series, and "That Regis Philbin Show." If programs such as these, which ordinarily would be sold to many independent stations across the Nation, are carried by CATV into their markets, many of these stations would be unwilling to purchase the programs. Thus, Westinghouse's economic base, upon which such substantial programming efforts necessarily depend, would gradually be destroyed by inability to make sufficient sales. Assuming a 5-year growth of CATV systems in the East on the scale established during the last 2 years, Westinghouse states that the cumulative adverse effect on independent programming sources in the larger markets would indeed be serious.

21. Westinghouse contends that its proposal for barring CATV from areas which now or in the near future will be served by three commercial stations, would further the public interest and effect a reasonable accommodation of the conflicting interests of the television broadcast and CATV industries, in harmony with the Commission's policy on the development of stations. It urges that the millions of Americans throughout the United States living in areas not served by three or more television signals, and therefore unable to receive the major programming services, should not be compelled to wait indefinitely for service. CATV can fill the television needs of such areas today, and should be allowed to do so, since the larger, more densely populated areas offer more promise for new UHF stations in the near future than low-density areas. While CATV would probably have some adverse economic impact on existing stations, this impact is offset in one- and two-station markets by the substantial benefit accruing to the public in the additional program choices provided by CATV.<sup>10</sup> No corresponding benefit can be demonstrated in three-station markets, where the contribution of CATV is minimal. In such markets, CATV can offer the viewing public little more than a duplication of programming which either has been or soon will be available via the local stations. Moreover, the possible loss to the public is much greater because of the eroding effect CATV would have on the sources of independent programming. Accordingly, Westinghouse believes that barring CATV from such areas while permitting

<sup>10</sup> Westinghouse would make an exception for two-station markets where a construction permit for a third station has been granted, permitting CATV only in the event the third station was not on the air after a reasonable period, like 6 months.

to serve all areas not adequately receiving the three major program sources would provide a tremendous benefit in terms of increased service to millions of Americans, while maintaining CATV in its traditional position as a fill-in service complementary to television broadcasting.

22. Westinghouse strongly urges that it is imperative for the Commission to stay immediately the commencement of operations by CATV's in those areas which now or in the near future will be served by three or more commercial stations pending the adoption of final regulations to this effect. It states that once CATV franchises are granted in the larger markets and construction is commenced pursuant to those grants, the Commission will in fact have lost effective control of television allocations in those areas. Should even a small part of the ambitious \$40,000,000 Philadelphia CATV plan be consummated, the practical and legal difficulties which the Commission would encounter in attempting to reverse the situation would be virtually insurmountable. Moreover, prompt Commission action is asserted to be essential to remove the uncertainty as to the future role of CATV which is discouraging investment in new UHF facilities. Westinghouse states that if the Commission fails to act within the reasonably near future, Westinghouse will be obliged to file "protective" applications for CATV franchises in those cities it now serves through television broadcasting when applications are filed by others, even though agreeing in principle that these adequately served markets should be open to CATV.

23. (e) *The MST petition for rulemaking.*—The MST petition for comprehensive rulemaking governing all CATV systems renews, with no amplification, the jurisdictional arguments made by the other petitioners. In support of its request for prompt rulemaking action and a stay of microwave grants pending the adoption of rules, MST argues that "CATV's rapidly accelerating movement away from its historic and proper role as an auxiliary, 'fill-in' service bringing television to areas unable to receive off-the-air broadcast service poses a grave threat to the growth of commercial and educational UHF television, to the integrity of the nationwide system of television allocations, and to the continuation, improvement, and expansion of free, competitive, local, and area television broadcasting generally." MST states that regulation of microwave CATV only, and the imposition of carriage and nonduplication requirements alone, would be insufficient to avert the threat. It asserts that the present trend of CATV development, if unchecked and inadequately regulated, would disrupt the growth of UHF television and frustrate the goals of the all-channel receiver legislation; could lead to the destruction of the system of television allocation through fractionalization, blacking out, or impairing local and area broadcasting service; and might prove to be the means of a gradual transition from advertiser-supported free television to pay TV. MST urges that CATV must be confined to its proper role as an auxiliary "fill-in" service, bringing television service to areas which cannot be expected to receive off-the-air broadcast service now or in the near future; for, CATV can appropriately supplement, but must not supplant, television broadcast service.



24. Accordingly, MST requests the Commission to assert jurisdiction over *all* CATV systems without further delay, pursuant to existing authority, and to proceed expeditiously towards the adoption of rules which would achieve adequate regulation, since the "long action is delayed, the more serious the impact of CATV, the more uncertain the rules of the game, and the less effective the action." Pending the adoption of rules, MST seeks a stay on microwave grants for CATV use. It states: "Such a stay is warranted here because of the scope of the problem, because conditions are changing at a rapid pace, and because there are now *no* Commission rules dealing in any way with CATV except as to limited technical matters. Additional rules the Commission should put on notice all persons who now operate or who propose to operate CATV systems that CATV operation, whether or not microwave relay is used, will be subject to regulation and that some CATV systems may be required to modify or cut back their operations."

25. Specifically, MST requests the Commission to initiate rulemaking of general applicability which would—

- (1) Provide appropriate standards to govern the technical quality of signals distributed by CATV;
- (2) Prevent CATV from duplicating within a specified period, the programming of television broadcast stations which serve, or which normally would be expected to serve, the community in question, and establish proper classifications to determine the circumstances under which CATV will not duplicate the programming of a station;
- (3) Subject to nonduplication requirements, require the CATV system to carry the signal of any station within the grade B or better contour which the community served by the CATV is located;
- (4) Permit a signal to be carried by CATV only if the community located within a prescribed signal contour of the station carried, or is closer than a specified distance from the station, or is consistent with a standard combining both distance and signal contours;<sup>11</sup>
- (5) Limit, with respect to television and visual material generally, CATV systems to reception and simultaneous retransmission of broadcast signals without insertions or deletions;
- (6) Require the filing of full information with respect to ownership interests in, direct and indirect control of, and officerships and directorships in CATV facilities.

#### DISCUSSION

26. The above-described petitions raise substantial questions of fundamental importance to the Commission's responsibilities under the Communications Act. We discuss in part I below the requests for Commission action to extend the requirements of dockets Nos. 14895 and 15233 to all CATV systems, and in part II the additional questions presented by petitioners' requests for other measures.

#### PART I

27. Insofar as petitioners urge that the rules governing CATV systems using microwave should extend to all CATV systems, we are in agreement. It has already been determined in the report and order in dockets Nos. 14895 and 15233 that CATV systems should carry local

<sup>11</sup> In a policy statement submitted to the Commission, MST suggested the grade B contour of the station carried, or a distance of 80-90 miles.

tations without duplication. The considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service, apply equally to all CATV systems and need no elaboration here. The main questions are therefore (1) whether the Commission can appropriately proceed on the basis of its present statutory authority, and (2) whether there are any special problems of substance or procedures inherent in an extension of the carriage and nonduplication requirements to nonmicrowave, or so-called off-the-air CATV systems.

28. The Commission's jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion. We have on more than one occasion in the past concluded that the Communications Act, without amendment, probably would not support broad jurisdiction, though not disclaiming jurisdiction to prevent adverse CATV impact on television broadcasting.<sup>12</sup> Moreover, we have previously taken the position that clarifying legislation would be appropriate, even assuming present jurisdiction, and have recommended such legislation to Congress. While the 86th Congress gave extensive consideration to some of the various proposals submitted by the Commission and others, no legislation was enacted and bills introduced in subsequent Congresses received no action.<sup>13</sup> However, neither the Commission's prior pronouncements nor the failure of Congress to act favorably on clarifying proposals is determinative of the legal question of the Commission's jurisdiction and authority over off-the-air CATV systems under the existing provisions of the Communications Act. *Illwaco v. Clifford*, 309 U.S. 311, 337-338; *United States v. Price*, 361 U.S. 304, 310-313; *American Trucking Assoc. v. United States*, 344 U.S. 298, 314; *Carter Mountain Transmission Corp. v. F.C.C.*, 321 F.2d 359, 364 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963).

29. Petitioners have made a strong case in support of present jurisdiction. We have carefully reexamined the pertinent provisions of the Communications Act in light of their arguments and the authorities cited. Upon such reconsideration, we conclude, for the reasons set forth in the attached memorandum as to jurisdiction, that CATV systems are engaged in interstate communication by wire to which the

<sup>12</sup> See *Frontier Broadcasting Co. v. Collier*, 16 Pike & Fischer, R.R. 1005; *Report and Order in Docket No. 12443*, 26 F.C.C. 403; *Distribution of Television Programs by CATV Systems*, FCC 62-871.

<sup>13</sup> Following the report and order in docket No. 12443, *supra*, the Commission recommended that the Congress amend the Communications Act to require CATV systems to obtain the consent of the stations whose signals they transmit, and to carry the signal of the local station (without degradation) upon request. These proposals were embodied in S. 1801, and H.R. 6748, introduced in the 86th Congress, including S. 2653 (providing for the licensing of CATV systems) and S. 2303 (providing for the issuance of certificates of convenience and necessity). The Communications Subcommittee of the Senate Committee on Interstate and Foreign Commerce held hearings on these bills, and several other bills which involved CATV systems, including S. 1739, S. 1741, and S. 1886. On Sept. 8, 1959, the Committee on Interstate and Foreign Commerce reported favorably on S. 2653. S. Rept. 923, 86 Cong., 1st Sess. In 1960, following 2 days of debate on the floor of the Senate (106 Cong. Rec. 10326, 10344, 10407, and 10520), S. 2653 was re-committed to the Committee on Interstate and Foreign Commerce by one vote, 106 Cong. Rec. 10547. As a result, no legislation relating to CATV systems was enacted in the 86th Congress. In the 87th Congress, the Commission proposed S. 1044, and H.R. 6840, which would have expressly authorized the Commission to issue rules for the protection of stations providing locally originated television programs. These bills received no action. The Commission proposed no legislation to the 88th Congress, and no action was taken on any bills.



provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It would further appear that the Commission's statutory powers, particularly under sections 4(i), 303 (f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave.<sup>14</sup>

30. For the reasons set forth in the report and order in dockets Nos. 14895 and 15233, it is desirable to extend the requirements there adopted to all CATV systems. We have accordingly decided to institute rulemaking to that effect. Although no specific rules are appended, it is proposed to make the substantive provisions of the rules adopted in dockets Nos. 14895 and 15233 applicable to all CATV systems. We repeat that two particular issues are raised—(i) the Commission's authority to promulgate such rules and (ii) the problem of substance or procedure posed by rules going to nonmicrowave CATV systems. In the latter respect we also point out that we shall take into account the experience gained, or additional information received, as a result of interim operation under the revised provision adopted in dockets Nos. 14895 and 15233, prior to their becoming generally applicable. In this way, we shall be in a position (assuming favorable resolution of the jurisdictional issue) to promulgate rule affecting all CATV systems and fully and fairly implementing the public interest both with respect to establishment and maintenance of local broadcast service and the provision of multiple television services. See paragraph 6, FCC 65-335, issued this day.<sup>15</sup>

31. Other matters should be pointed up. While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford the interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (i) a congressional guidance as to policy and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from

<sup>14</sup> In initially reaching this conclusion, we have considered the various comments submitted in opposition to the ABC and other petitions.

<sup>15</sup> Since there has been extensive examination of the matters in dockets Nos. 14895 and 15233 a shorter time for filing comments and reply comments on part I will therefore be scheduled. We are unable to agree with Springfield's contention that immediate relief is procedural in nature or to conclude that summary procedures would be proper.

promulating rules along the lines of those adopted in dockets Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

32. Third, in the event that it is ultimately determined that the Commission has jurisdiction over all CATV systems, we do not contemplate regulation of such matters as CATV rates to subscribers, the extent of the service to be provided, or the award of CATV franchises. Apart from the areas in which the Commission has specifically indicated concern and until such time as regulatory measures are proposed, no Federal preemption is intended. Rather, we view our role as one of cooperating with local franchising authorities and State regulatory commissions to the maximum extent possible, such as by making information available to them, consulting with respect to technical standards for CATV operations, etc.

33. Fourth, in dockets Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (report and order in dockets Nos. 14895 and 15233, par. 143). However, we were unable to determine without further information whether this exception should apply across the board or whether the CATV system should be required to make a showing that a certain number or percentage of its subscribers possess color receiving sets before color duplication would be permitted. Accordingly, comments are requested as to whether the rules should require a threshold showing by the CATV and, if so, what kind of showing would be appropriate. Whether or not the Commission adopts rules going to all CATV systems, the comments received will, in any event, be applicable to microwave CATV systems.

34. We will consider in this proceeding the question of whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and nonmicrowave CATV systems with limited channel capacity. It is contemplated that a questionnaire will be mailed to every known CATV operator in the near future seeking specific information to assist in making this determination (see FCC 65-335, par. 161). In the event that any CATV operator is inadvertently omitted from such distribution, a copy of the questionnaire will be supplied upon request to the Commission.

35. The proceedings in dockets Nos. 14895 and 15233 were primarily concerned with commercial rather than educational television stations (ETV). While the carriage requirements were made applicable to

educational stations, the nonduplication provisions were not, since many of the pertinent considerations are obviously not present in the case of ETV. We recognize, however, that the carriage requirement alone may not be sufficient to promote the sound growth of local educational stations. Accordingly, information is requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

36. We are also interested in such questions as whether the carriage and nonduplication requirements should be extended to protect station owned translators, which are located outside the station's predicted grade B contour, so as to encourage these off-the-air facilities. If protection were to be accorded such translator facilities, should the rules be along the lines of those adopted for local stations, or would different provisions be more appropriate? Conversely, some of the comments in dockets Nos. 14895 and 15233 suggested that station owned translators should be precluded from duplicating the program of local stations. Interested persons are invited to address themselves in this proceeding to the question of whether there is a problem warranting action.<sup>16</sup>

#### PART II

37. The petitions also raise broader questions of substance concerning CATV development, both microwave and nonmicrowave, which were not involved or settled in dockets Nos. 14895 and 15233. Thus, it is asserted (1) that the trend of CATV entry into large population centers like Philadelphia and Cleveland poses a threat to the development of independent stations and program sources, which will not be averted by the carriage and nonduplication requirements and which may frustrate the goal of the all-channel receiver legislation in the communities with the most immediate promise for new UHF facilities. It is also asserted (2) that generalized restrictions on the distance the signal of a television station may be extended beyond the station's contour are necessary in order to prevent the multiplicity of local stations contemplated by the sixth report and order from being ultimately displaced by a CATV "network" distributing the New York, Chicago, and Los Angeles stations nationwide. And it is asserted (3) that CATV systems should be required to select the stations they carry in an order of priority determined by the distance of each station from the system, i.e., that the system should carry nearest stations in preference to more distant ones, so as to avoid "leapfrogging." Next, the petitions raise a question (4) as to whether CATV systems should be limited to receiving and simultaneously retransmitting television broadcast signals without addition or deletion or should be subject to sections 315, 317, and 310 of the act and various Commission policies (e.g., the "fairness doctrine" and concentration of control policies). A related question is presented as to the possible development of combined CATV-pay TV operations and the need for regulation to avoid adverse consequences to the free television broadcast.

<sup>16</sup> In this connection, comments are requested on the extent to which networks or other program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators.



cast service. And (5), it appears to the Commission that there are other areas of concern.

38. For the reasons next set forth, we believe that inquiry to ascertain the facts in each of these areas is warranted in the public interest. The inquiry will develop information upon which we can determine whether rules or legislative proposals to the Congress are appropriate.

(1) *Effect on Development of Independent (Nonnetwork)  
UHF Stations*

39. Of concern to the Commission is the mushrooming entry of CATV into major centers of population insofar as this affects the opportunities for new UHF stations. The developing pattern of CATV described by petitioners is confirmed by the CATV industry itself as an augury of coming events. The largest CATV group, H. & B. American Corp., recently advised its stockholders that CATV activity in larger cities is of first importance among significant CATV developments, stating:

First, and of overriding importance, is the shift of CATV strength to a new locus. The centers of the most intense CATV development now are the very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.

But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. Baltimore will be the next large U.S. city to receive multiple CATV franchise applications.

The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day. It is reported that at the end of 1964, 700 cities throughout the Nation were entertaining CATV proposals.

In virtually every instance these authorizations are fought for in intensively competitive proceedings before local governing bodies. The applicants represent a cross section of the most prominent companies in the Nation. For example, in Philadelphia they include the Philadelphia Bulletin, Storer Broadcasting, the Philadelphia Inquirer-Triangle-Annenberg interests, a number of well financed influential local groups, and a sprinkling of large CATV organizations.

40. The shift in the locus of CATV activities to the larger cities is cause for concern as to the effect on UHF and the stated goal of Congress in enacting the all-channel receiver legislation to make "provision for at least four commercial stations in all large centers of population" (H. Rept. No. 1559, 87th Cong., 2d Sess., p. 3). The following are the underlying congressional and Commission policy considerations as to development of the UHF:

41. (i) Congress has only recently reaffirmed the goal of "an effective national television" system through use of the UHF channels (*id.*, p. 6; see also p. 3). As the first item in such an effective television system, Congress listed the need "for at least four commercial stations in all large centers of population" (*id.* at p. 3). Such a

fourth station might make possible a fourth national network or the formation of FM-type "networks" in television, thus bringing added diversity to the field. Or, as both House and Senate reports stress, such a station might be "available particularly for local programming and self-expression \* \* \*"—an important need in many markets "because all of the available stations are network affiliates" (H. Rept. p. 3; S. Rept. No. 1526, 87th Cong., 2d Sess., p. 4). In short, the fourth commercial station is important both to make our system "truly competitive on a national scale" (H. Rept., p. 3) and to further better local service.

42. (ii) Congress has also determined that the way to achieve the above goal is through effective use of UHF channels, since most large centers of population now have three full network stations and many unoccupied VHF frequencies. While Congress was generally aware of CATV (e.g., the same Senate committee which considered the all-channel television receiver law in 1962 had held extensive hearings on CATV in 1959), it stated its view that all-channel receiver legislation, because it would develop UHF, "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. at p. 4; S. Rept. at p. 7). It therefore enacted this "unique" all-channel set legislation, stating the increased price which the consumer will have to pay, at least initially, for all-channel sets "will be well worth the cost if this is the only way in which the American people can be assured of the benefits of television service to the fullest degree" (H. Rept. at pp. 8-9). Since the sale of television sets now exceeds 9,000,000 a year, the American people are now paying those costs, in the substantial amount of many millions each year.

43. (iii) There is every present indication that the all-channel set requirement is having its desired effect, and that the legislative goal is in the process of being realized. There has been greatly increased interest in UHF, with many applications filed—preponderantly for the larger cities. See attached chart (app. A) showing the market with no commercial UHF station on the air but with commercial UHF construction permits granted and/or commercial UHF channels applied for. But as Congress noted in 1962, the all-channel law will not smooth the road for the UHF broadcaster overnight; rather, "Substantial time will have to elapse \* \* \* before a large majority of the public becomes equipped with all-channel receivers" (H. Rept., p. 7; S. Rept., at p. 6).

44. (iv) The Commission also has noted that UHF stations face considerable obstacles during this crucial period. UHF must overcome the psychological factor of its previous failure in intermixed markets. Further, apart from intermixture and the initial limitation on audience pending set conversion or turnover, independent UHF stations in these cities will compete with three network affiliates for audience attention without having the advantage of the attraction of the popular network programming. The Commission therefore has stressed that it will not now take action which would be inconsistent with the congressional goal and which might jeopardize the "invest-



ment in all-channel receivers" (H. Rept. at p. 8) which has been asked of the American public.

45. The question before the Commission is what is the effect of CATV entry into the large markets upon the realization of the above goals for UHF. The problem is perhaps best pointed up by consideration of a specific case—Philadelphia. That city is a prime example of potential UHF activity, with two UHF independent stations scheduled to go on the air in mid-1965. But Philadelphia is also a prime example of CATV activities, with the CATV applicants in Philadelphia proposing to carry the New York independents. The Philadelphia UHF stations, in competing with three network VHF stations, will be relying solely upon reaching an audience interested in independent (nonnetwork) programming. Since the local competition is not only VHF but enjoys the advantage of popular network programming, unexpected fractionalization of the audience interested in independent programming could be particularly harmful to these independent stations.<sup>17</sup> And, the CATV will be doing just that—bringing in three New York stations which also direct their efforts to the audience interested in independent programming. The crucial question is thus whether the result will be that New York independents will, in effect, be replacing Philadelphia UHF independents, with a concomitant loss of local service or the other advantages noted in paragraph 41.

46. The Commission needs further information with respect to that question before reaching a conclusion. On the one hand, it is urged that CATV systems in Philadelphia or similar large cities will remain relatively small and do not pose any significant threat to the legislative goal noted in paragraph 41. See, e.g., Seiden report, pages 84-86. Indeed, it is urged that the CATV system will benefit the new UHF operation by bringing the UHF station's signal into homes which do not yet have all-channel receiver sets or where UHF reception might otherwise be difficult.<sup>18</sup> There are, however, indications running counter to the claim that CATV operations will have relatively little impact. Consider, for example, the extensive nature of the CATV operations proposed in some of the large cities (in Philadelphia, we are told that a \$40 million CATV investment is contemplated). And, generally, the spirited competition for CATV franchises in major cities by well-financed groups would appear to reflect the confidence of the CATV applicants in their success.<sup>19</sup>

<sup>17</sup> Moreover, the nonduplication time period prescribed in dockets Nos. 14895 and 15233 is geared largely to the schedule of network program distribution, on the premise that network affiliates will have a reasonable opportunity for viable operation if their popular network programming is not subject to CATV duplication. The prohibition against duplication 15 days before or after the local broadcast will provide only partial relief, at best, to independent stations, which rely on nonnetwork programming that is not presented simultaneously, or nearly so, nationwide.

<sup>18</sup> We note, however, in connection with the Philadelphia example which we have been discussing above, that the franchise application of Jerold Corp. in Philadelphia does not propose to carry the Philadelphia UHF stations on the CATV system, until such time as it might convert from a 12-channel to a 20-channel system.

<sup>19</sup> We also note, in this regard, that the Seiden report (pp. 85-86) does not consider the likelihood that the Philadelphia audience which would be attracted to the programming of the New York independent stations is the very heart of the audience at which any independent Philadelphia UHF station must aim. Instead, it is assumed that the potential Philadelphia audience for New York independent stations is like any other part of the Philadelphia audience, from the standpoint of Philadelphia independent stations. This assumption, we think, raises a question as to the correctness of the conclusion reached in the report.

47. It may be, after development and study of the facts and consideration of the arguments of interested persons, that the problem will appear less serious or take on new aspects. Or, it may be that CATV systems should not enter markets like Philadelphia for a period of 4 or 5 years—roughly the length of time remaining, when Congress specified as necessary in order to permit the substantial effects of the all-channel set law to be felt (i.e., to permit UHF independent stations to gain a proper foothold). We need further information before reaching a decision and, for that reason are initiating this inquiry. For, we do know that we would be wholly remiss in our responsibilities if we ignored the problem—and simply permitted events to occur (indeed, often with the aid of our authorizations for the microwave services) which might jeopardize the congressional goals just set, and the “investment in all-channel receivers” which the public is now making. If such goals are to be changed, that is a matter for Congress (with our task to collect the facts and make appropriate recommendations).

48. Accordingly, inquiry is warranted to determine the conditions under which CATV should be permitted to operate in areas with potential for independent stations. Such areas include not only communities with four or more commercial channel assignments but also those areas where any new station would rely very substantially upon independent programming sources because of overshadowing by this network services from nearby communities. Since we have no preconceived views as to the role of CATV in these areas or what conditions might be appropriate, comments furnishing full information as to pertinent factors and suggesting possible measures for achieving a reasonable accommodation are invited from all interested persons. As a starting point, comments are requested on the measures and proposals urged by petitioners in this respect.

49. While the proceeding is underway, we shall carefully examine applications coming before us which involve the above problem. This means that pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing must be made in applications for microwave facilities to serve a CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the grade contour of such three or more commercial stations), any new UHF television station would be independent in operation.

50. The foregoing takes up the Commission's concern and course of action as to microwave applications coming before it during the

interim period while the proceeding is underway.<sup>20</sup> The same concern is applicable, whether or not the CATV proposes to employ microwave facilities, to situations where there is proposed large-scale CATV operations in major cities with burgeoning UHF independent development. Indeed, we note that the large-scale CATV operations proposed for Philadelphia do not make use of microwave facilities. We therefore request comments on what interim course of action, if any, may be appropriately followed by the Commission in this respect.<sup>21</sup> Since the matter is of such short-term nature (i.e., pending resolution of the proceedings), the shorter time period for comments and reply comments applicable to part I of the notice shall govern, and we will reach an early determination (see par. 30). In order to be in a position to take definitive action, if appropriate, we specifically invite comment on whether the foregoing course of action as to applications for the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit the extension of the signal of any television station beyond its grade B contour into a community with the situation described above (par. 49), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community). This is also one of the matters which we shall bring to the attention of the Congress. Finally, we believe that franchising authorities will give due regard to the fact that the matter is thus under Commission consideration.

*b) Generalized Restrictions on CATV Extension of Station Signals*

51. Both the ABC and the AMST petitions urge that more general action is necessary to prevent fractionalization of audience and potential damage to the nationwide system of television broadcasting through a multiplicity of local stations contemplated by our allocations scheme. Accordingly, they propose general limitations upon a CATV's ability to extend the service area of any station—either in terms of distance from the station or of a specified signal contour or some combination of the two.<sup>22</sup> The issue is particularly raised whether the extension—perhaps for hundred of miles—of the service of a powerful station operating in a very large market (and thus able to devote more resources to obtaining programming) may have an especially adverse impact upon the development or maintenance of the local stations contemplated by the allocations scheme.

<sup>20</sup> We have also taken into account, in our decision to adopt this interim policy, the fact that the areas to which the policy will be applicable do have a significant amount of television service, with additional new UHF service in the offing.

<sup>21</sup> Such comments may discuss the jurisdictional as well as the policy considerations in a particular course of action.

<sup>22</sup> We note in this connection that plans are on the drawing board for a CATV system capable of 20 channels. Interested persons may wish to address themselves to the question of what effect CATV operations of this or a similar nature might have on local stations in terms of fractionalization of audience, and whether some limitation as to the number of signals carried should be considered.



52. We have reached no conclusion that broad-scale restriction along these lines are warranted.<sup>22</sup> Rather, as a part of our general inquiry, we invite comments directed to the proposals.

### (3) "Leapfrogging"

53. Petitioners' assertions concerning the so-called leapfrogging issue (i.e., the distribution by the CATV system of distant signals in preference to signals of stations located much closer to the system) also raise a matter of future importance. Again we have reached no conclusion on this issue and would simply have the interested parties address themselves to it, both as to the facts and to pertinent policy considerations (and also the proposals which have been advanced by parties such as AMST in this respect). Thus, does it promote "a larger and more effective use of radio in the public interest" (sec. 30 (g)), if the closer signals are carried (on the ground that carrying of such signals would bring a programming service more likely to conform closer to meeting the CATV community's interests than those from a distant state)? Is such carriage called for in the public interest in order to extend the service area of UHF stations or VHF stations serving sparsely populated areas—and thus enhance, to some extent, their chances of successful operation and their ability to serve fully the needs and interests of these areas?<sup>23</sup> If a policy along the foregoing lines were to be adopted, should it be accompanied by a concomitant duty, on the part of the station carried, to provide some amount of programming of particular interest to the people in the CATV's community? Cf. *Petersburg Television Corp.*, 10 Pike and Fischer, R.R. 567, 584j—584q; *NTA*, 22 Pike and Fischer, R.R. 27, 295. What kinds of disruption or other problems would such a requirement pose for CATV systems? If "leapfrogging" rules were adopted, is there a probability that the CATV, in order to meet the rules and still bring in desired distant signals, may distribute so many signals that the fractionalization of the audience aspect becomes much more serious (in the event there are local stations being carried pursuant to the requirements of the rules adopted in dockets No. 14895 and 15233)? These questions by no means exhaust the list of pertinent considerations to which we hope the interested parties will address themselves.<sup>25</sup>

### (4) *Program Origination or Alteration by CATV; Pay-TV or Combined CATV-Pay-TV Operations*

54. A fourth area of concern is the question of program origination or alteration by CATV. There was some indication in dockets No.

<sup>22</sup> Certainly, we have not concluded that there should be restrictions which might prevent areas now without the benefit of the basic services of the three national networks from ever obtaining those benefits. But here we note that AMST would appear to have exceptions to the general restrictions it proposes where a CATV makes a showing of public need for its service.

<sup>23</sup> In this connection, we note our discussion in the report and order in dockets Nos. 14895 and 15233, par. 69, as to increased awareness by rating services and advertisers of CATV penetration and CATV extension of a station's service.

<sup>25</sup> We do not believe it necessary or appropriate, pending resolution of this issue, to hold up all applications for microwave facilities to relay television signals to CATV systems. Rather, parties may bring public interest considerations pertinent to this issue to our attention in connection with specific applications, and we ourselves shall examine such applications with this issue in mind.

4895 and 15233 that CATV systems may be originating advertising material in some instances and deleting advertising from the station signals carried. We believe that inquiry is appropriate to determine whether CATV systems should be subject to the provisions of sections 315 and 317 of the Communications Act and to a requirement that there be no deletion of the station identification announcement of any signals carried.

55. A related question is presented by the assertion of some of the petitioners that CATV might become a vehicle of pay-TV or combined CATV-pay-TV operations. They express a fear that the end result of such operations might be to siphon off top attractions from free television, if the fees obtained from large-scale CATV operations should enable CATV operators to outbid television broadcast stations in the program supply market, or that it might prove to be the means of gradual transition from advertiser-supported free television to pay-TV generally. It is further urged that CATV systems should not be permitted to use the distribution of free television signals as a base for engaging in pay-TV operations. We have been advised of at least one instance where a CATV system has devoted a channel on the cable exclusively to the presentation of its own programming (both CATV originated local programs and films acquired from others).

56. The possible impact of subscription television on free television broadcast service has been a continuing subject of Commission and congressional concern. See *Third Report on Subscription Television*, 3 F.C.C. 265; *Connecticut Committee Against Pay TV v. Federal Communications Commission*, 301 F. 2d 835 (C.A.D.C.), cert. den., 311 U.S. 816. In light of that concern, comments are requested on the feasibility or desirability of pay-TV operations by CATV, whether any conditions would be required for the protection of the public interest in free television, and what conditions might be appropriate.<sup>26</sup>

57. In short, comments are requested as to whether CATV systems should be limited to simultaneous distribution of station signals without additions or deletions, or whether there should be no limitation on program origination by the CATV, or whether some intermediate position would be appropriate. The Commission has reached no conclusions in this area, and requests comments on all facets of the question. For example, in addition to the two basic issues posed above (i.e., complete restriction or complete freedom as to program origination), there are intermediate issues where comment might be helpful. Thus, comments are invited on the question of whether any such prohibition against CATV program and advertising origination should apply only where the CATV is operating in an area served by one or more television broadcast stations. In the absence of any local station, would the public interest be served if the CATV were not only permitted, but even encouraged, to serve the community by providing an outlet for local self-expression? Where there is but one local station, should the CATV be barred from carrying advertis-

<sup>26</sup>This proceeding is in no way intended to be concerned with, or to affect, the question of whether there is a property right in the broadcast signals carried by CATV systems (see FCC 65 —, par. 159).

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ing but permitted and encouraged to present local programming, particularly in the news and public affairs field (on the ground that such local programming provides a needed diversity in a monopoly situation, and poses no threat to the viability of the local station)?

58. Some of the foregoing matters may be appropriate for Commission rulemaking (e.g., the sec. 315, sec. 317, or station identification requirements), while others may call for congressional consideration and resolution. Again, we think that as a matter of "first things first," we should garner the facts and pertinent considerations.

### (5) *Other Areas of Concern*

59. In view of the interest engendered concerning ownership and control of CATV systems, comments are requested on the proposals of petitioners with respect to the regular filing of information as to CATV ownership, control, and management (see particularly the Boise and AMST petitions). Would it be appropriate to require the periodic filing of other information, such as the location of the CATV system, the number of subscribers, the signals carried, and the extent of program origination, if any? While much useful information was gathered in connection with dockets Nos. 14895 and 15233, the statistics will soon be out of date in a rapidly changing CATV field. Moreover, the questionnaire discussed in paragraph 34 above was occasioned by a lack of specific information with respect to each CATV system. It appears to us that it might be more efficient and serve the convenience of interested persons, as well as the Commission, if pertinent information were regularly supplied by each CATV operator on a current basis.

60. The general matter of cross-ownership of CATV systems and broadcast facilities is being pursued separately in docket No. 151. Interested persons are nevertheless invited to address themselves in this proceeding to those aspects of the cross ownership question which may be pertinent to the overall policy questions raised here. For example, there is the question of whether grants for translator facilities or local stations should be made to CATV systems in communities which have no off-the-air television service where there is no imminent likelihood of an independent applicant. In other words, would the public interest be served by permitting, or even encouraging, CATV systems to provide an off-the-air service to areas which would otherwise have none? Should a similar policy be followed to provide a second off the air service, or would cross-ownership afford the CATV licensee an unfair competitive advantage over the independent licensee? (see FCC 65-335, pars. 91, 134).

61. Another area of great interest to the Commission is the proposal in Dr. Seiden's report that rulemaking action should be taken to afford potential and existing stations a sufficiently large service area to withstand CATV penetration. This proposal is set out in detail at pages 7, 89-90 of the report and will not, therefore, be repeated here. Comments are requested as to the feasibility and merits of the proposal and the most appropriate way of implementing it.

fore generally, we are of the opinion that all of our rules and policies could be re-examined to see if they are holding back or encouraging variety of off-the-air services. In this connection, there is pending proposal to facilitate the use of translators on allocated channels (FCC 65-129, docket No. 15858).

62. Some of the petitioners have urged the Commission to establish appropriate technical standards to govern the operation of CATV systems, e.g., with respect to the technical quality of signals distributed by CATV. It appears to us that the matter of technical standards warrants inquiry. As a starting point, comments are requested on the proposals of petitioners (see RM-636 filed by Springfield, p. 6, l. 6 above, and the proposal of AMST, p. 12, par. 25(1) above).

63. The foregoing discussion has been directed toward CATV operations vis-a-vis television broadcast facilities. It has been brought to our attention that a standard broadcast or FM radio station might face serious audience fractionalization if a CATV system were to bring a number of competing aural signals to its subscribers. Accordingly, comments are requested as to whether any serious problem exists, or is likely to exist, in this area and, if so, the nature of any regulatory measures which might be appropriate to govern the distribution of aural signals by CATV.

64. In sum, inquiry to ascertain the facts and appropriate policies in each of these areas is warranted in the public interest. Nor do we mean to restrict comments just to the above areas. Persons may, of course, point up other facets of this overall problem where remedial action may be appropriate (e.g., whether our policies with respect to other auxiliary services, such as translators or satellites, should be modified). The information developed might be useful to the legislative consideration of CATV and would assist the Commission in making recommendations to the Congress. Moreover, a sufficient basis has been shown to establish that additional rules may be required for adequate protection of the public interest and the regulatory scheme. In the absence of further information, we do not have a sound basis for specific rule proposals. However, in order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above. Counterproposals as to possible alternative measures are also invited. We stress, however, that the main thrust of this proceeding is to gather the facts and to obtain the comments of the parties on the pertinent policy considerations. A further notice will at all likelihood be issued to afford an opportunity for comment on the specific rule proposals of the Commission.

65. The inquiry and proposed rulemaking are directed toward all CATV systems. The questions raised by petitioners or indicated by the Commission are pertinent to our responsibilities in licensing microwave facilities for CATV use, whether or not rules governing all CATV systems are ultimately adopted. Consideration of nonmicro-

wave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. All Commission action taken during the pendency of this proceeding will, of course, be subject to the outcome of the proceeding and any rules adopted will be made appropriately applicable, such as at license renewal time.

66. Accordingly, there is instituted herewith, pursuant to the provisions of section 403 of the Communications Act, an inquiry into the foregoing matters. Authority for the rulemaking proceeding instituted herein is contained in sections 2, 3, 4(i), 303, 307, 308, 309, 310, 315, and 317 of the Communications Act of 1934, as amended.

67. All interested persons are invited to file written comments on the rule amendments proposed in part I, and on paragraph 50, on or before June 25, 1965, and reply comments on or before July 26, 1965. Comments on the inquiry and proposed rulemaking in part II may be filed on or before August 27, 1965, with reply comments due on or before October 25, 1965. In reaching its decision in this matter, the Commission may also take into account any other relevant information before it, in addition to the comments invited by this notice.

68. After study of the comments, the Commission may, by subsequent order, specify a number of days for the presentation of oral argument on these important matters. It is also contemplated that oral testimony may be solicited, and appropriate orders specifying the nature and time may be issued at a later date. After comments have been received, the Commission may well spin-off portions of the rulemaking for early decision, since other portions may require lengthy consideration.

69. In accordance with the provisions of section 1.419 of the Commission's rules and regulations, an original and 15 copies of all comments, replies, pleadings, briefs, or other documents filed in this proceeding shall be furnished the Commission.

70. In light of the foregoing, *It is ordered*, That the various requests made in the pleadings filed by American Broadcasting Co., Springfield Television Broadcasting Corp., Boise Valley Broadcasters Inc., Westinghouse Broadcasting Co., Inc., Association of Maximum Service Telecasters, Inc., Capital Cities Broadcasting Corp., Taft Broadcasting Co., and National Community Television Association, Inc., *Are granted in part*, to the extent reflected in this notice, and *Are otherwise denied*.

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## APPENDIX A

MARKETS WITH NO COMMERCIAL UHF STATION ON AIR BUT WITH COMMERCIAL UHF CONSTRUCTION PERMITS GRANTED AND/OR COMMERCIAL UHF CHANNELS APPLIED FOR

	Commercial VHF sta- tions on air	Commercial UHF con- struction permits	Commercial UHF chan- nels applied for	Vacant com- mercial UHF channels
anta, Ga.	3	1		
stin, Tex.	1	12		
stin-Rochester, Minn.-Mason City, Iowa	3		1	2
ltimore, Md.	3	1	1	
irmingham, Ala.	2	1	1	
arlotte, N. C.	2	1		
arleston-Huntington, W. Va.	3	1		
cininnati, Ohio	3	1		
leveland, Ohio	3		2	
umbus, Ohio	3		1	
llas-Fort Worth, Tex.	4		2	1
troit, Mich.	3	12	1	
zene, Oreg.	2			1
uston-Galveston, Tex.	3	1	3	2
ianapolis-Bloomington, Ind.	4		1	2
ksonville, Fla.	2	1	1	
lin, Mo.-Pittsburg, Kans.	2		1	2
ansas City, Mo.	3		2	
hock, Tex.	2		2	
idian, Miss.	1	1		
mi-Fort Lauderdale, Fla.	3	12	1	
land, Tex.	1	1		
neapolis-St. Paul, Minn.	4		1	
w Orleans, La.	3	1	1	2
folk-Portsmouth-Newport News, Va.	3	1		
abama City, Okla.	3	1		
ardelphia, Pa.	3	3		
sburgh, Pa.	3	2		
vidence, R.I.	2	1		
Louis, Mo.	4	1		1
Diego, Calif.	2	1	1	
Francisco-Oakland, Calif.	4	3	1	1
Jose-Salinas-Monterey, Calif.	2	1		1
edo, Ohio	2	1		
sa, Okla.	3	1		1
co, P. R.	2	1	1	1
Total	96	34	25	17

<sup>1</sup> A permittee has gone on the air since Jan. 1, 1965.

<sup>2</sup> There is also a C.P. for a commercial VHF station.

## APPENDIX B

## COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio \* \* \* and to all persons engaged within the United States in such communication \* \* \*." These terms are defined in section 3 of the Act. Section 3(a) defines wire communication as the "transmission of \* \* \* pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of \* \* \* pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission." From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by



wire or radio. They transmit "pictures, and sounds \* \* \* by aid of wire" and are "instrumentalities \* \* \* [used for] \* \* \* the receipt, forwarding, and delivery of communications \* \* \* incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).<sup>1</sup> Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (the transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established \* \* \* as interstate communication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Reserve Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).<sup>2</sup> The law is clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate in nature and subject to the Commission's jurisdiction even though the facilities are located within the confines of one State. *California Intercontinental Telephone Company v. F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward v. Northern California Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific Tel. & Tel. Co. Inc.*, FCC 64-1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of an interstate service of the television broadcast stations whose signals they carry. *Clarksburg Publishing Co. v. F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.), and they constitute "interstate communication by wire" to which the provisions of the act are applicable (sec. 2(a), 3(a)). See *American Trucking Association v. United States*, 344 U.S. 298, 311.<sup>3</sup>

With respect to the Commission's authority to adopt the rules proposed in the notice of inquiry and proposed rulemaking, i.e., the "provisions of [the act] that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the crucial sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in dockets Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1 and 307 (i.e., the sixth report and order).<sup>4</sup> See *Carter Mountain Transmission Corp. v. F.C.C.*, 321 F. 2d 359 (C.A.D.C.), *cert. den.* 375 U.S. 951 (1963). The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to:

- perform any and all acts, make such rules and regulations and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions (4(i));
- make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act \* \* \* (303(f));
- establish areas or zones to be served by any station (303(h)); make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act \* \* \* (303(r)).

<sup>1</sup> It can be argued that CATV systems, in receiving, forwarding, and delivering a station's signal to the viewing public, are the instrumentalities incidental to the transmission of the signal and hence fall within the definition of "communication by radio" under sec. 3(b). However, it is unnecessary to consider this argument in view of the discussion above as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operations clearly fall within sec. 3(a) and/or sec. 3(b), a determination of their precise status is not essential to the question of the Commission's jurisdiction to proceed as proposed in the notice of inquiry and proposed rulemaking.

<sup>2</sup> Congressional approval of the *Capital City* doctrine was expressed in connection with the 1960 amendment to sec. 202(b). See 105 Cong. Rec. at 6256.

<sup>3</sup> It is, we believe, significant that in sustaining the jurisdiction of the Interstate Commerce Commission, in *American Trucking* the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of the Communications Act. Compare 49 U.S.C. 302(a) and 303(a)(19) with 47 U.S.C. 1 and 153 (a) and (b).

<sup>4</sup> In addition, as noted in the notice, there exists the potential to frustrate the purpose of the act embodied in secs. 303(p), 310, 315, 317, and 508 (and certain Commission regulations).

<sup>5</sup> Sec. 303 (f), (h), and (r) are preceded by the following clause:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—"



The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this act (e.g., secs. 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV sec. 2(a)). Section 3(h), in particular, was affirmatively designed to assist the Commission in effectuating the fair and equitable distribution of broadcast service called for in section 307(b).<sup>6</sup> The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the Commission (secs. 4(i) and 303(r)) includes authority to take necessary action, inconsistent with the act or law, to prevent frustration of section 307(b) by CATV. In *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 215-220, the Supreme Court citing, inter alia, sections 1, 303(f), and 303(r), stated that:

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio \* \* \*. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers,<sup>7</sup> the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to ensure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the act's provisions are applicable. This authority does not depend on a specific reference to CATV or to TV practices in the act. *United States v. Storer Broadcasting Co.*, 351 U.S. 2, 203. See also, *National Broadcasting Co. v. United States*, 319 U.S. 190, 219, where the Supreme Court stated:

True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic \* \* \*. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards

<sup>6</sup> Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills amending the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st Sess., pp. 40-41.

<sup>7</sup> See also, *Stahlman v. F.C.C.*, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Cong. Rec. 8822-23, 10313-14, 10990): 66 Cong. Rec. 5479; S. Rep. 772, 70th Cong., 1st Sess., pp. 2-3.

for judgment adequately related in their application to the problems to be solved.<sup>8</sup>

To the same effect in other fields, see *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342; *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 110; *U.S. v. Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc. v. U.S.*, 344 S. 298; *Public Service Commission of State of New York v. Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).<sup>9</sup>

The *American Trucking* case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." After discussing sections analogous to section 307(b) in our situation, the Court stated 14 U.S. at 311):

Included in the Act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rule-making power, coterminous with the scope of agency regulation itself, must extend to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a) (19).

We point out that section 204(a) (6) of the Motor Carrier Act is substantially similar to sections 303(c) and 4(i) of the Communications Act, while in the circumstances, sections 202(a) and 203(a) (19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the Act," stating (at pp. 309-310):

Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draft-men of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every problem sought to be corrected. But no great acquaintance with practical affairs is required to know that such prescience either in fact or in the mind of Congress, does not exist. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219-220; \* \* \*

Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created. \* \* \* See, also, *Public Service Comm. of N.Y. v. FPC*, 327 F. 2d 893, 896-97 (C.A.D.C.).

Of course, the rules must be "reasonably necessary and fairly appropriate" for the protection of the regulatory scheme. *Colorado Interstate Gas Co. v. Federal Power Commission*, 142 F. 2d 943, 952 (C.A. 10). See also, *American Trucking Assn. v. U.S.*, 344 U.S., at 314-315; *National Broadcasting Co.*

<sup>8</sup>The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated (319 U.S. at 217-218):

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to a larger and more effective use of radio in the public interest. We cannot find in the act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of signal. But the community could be deprived of good radio service in ways less obvious. One man, financially and technically qualified, might apply for and obtain the license for both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is evidence that Congress did not mean its broad language to carry the authority it expressed."

<sup>9</sup>The *Public Service Commission* case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers, although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provisions of sec. 16 of that act which are virtually the same as sec. 303 of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems in administration in regulating this huge industry and should have a basis for coping with such confrontation."

319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").<sup>10</sup> The record and order in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necessity of rules requiring all CATV's to carry local stations with duplication for a reasonable period. Moreover, the *Carter Mountain* decision establishes the reasonableness of the requirements. In affirming the decision, the Court stated that "this does not appear to us an unreasonable action" but rather "a legitimate measure of protection for the local station and the public interest" (321 F. 2d 359, at 363-364). The notice of inquiry proposed rulemaking similarly demonstrates the validity of the Commission's action as to the effect of CATV on independent stations and programing sources, as well as on the development of UHF in the larger markets. In conclusion, it would appear that under the broad regulatory powers vested in the Commission by the Communications Act, the Commission presently has jurisdiction over all CATV systems, whether microwave is used or not; that there are no explicit provisions of the act applicable to the exercise of authority over such systems (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

STATEMENT OF COMMISSIONER ROBERT T. BARTLEY CONCURRING IN PART  
AND DISSENTING IN PART

I concur in the notices to the extent that they seek data for resolution of the matters here before us, but dissent to the indication of present authority over CATV.

STATEMENT OF COMMISSIONER LOEVINGER CONCURRING IN PART AND DISSENTING  
IN PART IN DOCKETS NOS. 14895, 15233, AND 15971

(Proceedings re CATV's)

\* \* \* \* \*

The Commission is issuing today a report and order, a notice of inquiry and of proposed rulemaking, a memorandum on jurisdiction, and the text of new rules all of which relate to the problems posed by community antenna television systems, commonly referred to as CATV's. These documents aggregate over 120 pages and set forth a mass of detail that the outlines of the problem, as well as the issues, are somewhat obscured, if not wholly submerged. Accordingly, it seems worthwhile to restate very briefly and simply what the problems and the issues are, in order to indicate my points of agreement and disagreement with the majority.

CATV is a system comprising an antenna for receiving television signals, and cables and auxiliary apparatus (such as amplifiers) for carrying the signals received into a number of receiving sets. CATV's are about as old as commercial television itself, the first systems having been started as early as 1950. CATV's have been developed in order to meet the wants of those who either because of distance or terrain were

The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. *Stark v. Wickard*, 321 U.S. 288; *NLRB v. Atlantic Metallic Casket Co.*, 205 F. 2d 324, 50-1 C.F.T. 100. Cf. *Peters v. Hobby*, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are used in interstate communication by wire to which the act's provisions are expressly applicable.

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unable to get television signals off the air in satisfactory quality numbers. (See articles in *Television Magazine*, June 1962, September 1964, and April 1965.)

For a variety of reasons, some of them related to actions of the FCC, the commercial CATV business has developed through independent companies which transmit or relay the signals and other companies which distribute the signals to subscribers. Typically there will be an antenna on some high point near a community which receives signals of a number of TV stations. These signals will be transmitted either by microwave relay or by coaxial cable to a point in the settled part of the community. At this point the relay company will deliver the signals to the CATV operating company. The latter will maintain and operate the system which distributes the signals over wires to the homes of subscribers within the community. In some cases the relay company will deliver signals to several CATV companies.

CATV's were started in mountainous areas of Pennsylvania and Oregon where television reception was either poor or nonexistent in many communities. As it appeared that CATV's were able to bring good reception and offer a variety of services to communities far from the major metropolitan centers, the companies spread to more communities and got more subscribers. Over the years, as television has grown in both numbers of broadcasting stations and numbers of homes, CATV has also grown, although by no means in proportion. In 1965 figures there are now about 566 television stations in the United States covering some 266 markets. (*Television Magazine*, April 1965, p. 8) Over 52 million U.S. households have television receivers, which is 82 percent of all of the U.S. households. (*Ibid.*) The CATV industry today has about 1,300 operating systems serving about 1.2 million homes. (Seiden report to the FCC, p. 1.) CATV's are concentrated largely in one- or two-station markets. Most systems are fairly small in size, about 90 percent having fewer than 3,000 subscribers, and the average having about 655 subscribers. Most CATV's deliver signals to their subscribers, although some deliver as few as three and some as many as seven or more. (*Ibid.*) However, the number and size of CATV's is growing and CATV systems are being offered to more communities, and to larger communities.

The proliferation of CATV's is regarded by many in the television business as an economic threat. It is said that while the broadcaster has the burden and expense of providing programming which the audience gets without payment and which must be supported by advertising, the CATV operator simply delivers the broadcasters' programs to subscribers and receives payment from them. This is said to constitute unfair competition. It is also alleged that the competition is not only unfair but destructive in some situations, because CATV's deliver the signals of far distant stations and deliver a relatively large number of signals to relatively small communities in which the audience is not large enough to support a number of stations. CATV's create the anomaly that some relatively small towns are provided with a greater choice of television programming over the local CATV than many larger cities have in the absence of CATV.

These circumstances have created a demand by many broadcasters of the FCC to take jurisdiction over CATV's and to institute measures to protect television broadcasters against competition of CATV's. As will be pointed out in some detail below, the FCC has instituted several proceedings and investigations relating to this matter. However, heretofore it has not taken any definitive action of general significance. While there has been some question as to the extent of the FCC jurisdiction, the Commission has had undisputed jurisdiction with respect to licensing microwave transmitting facilities for those relay companies that carry TV signals by microwave. The manner of exercising that jurisdiction is one of the matters that has been bitterly disputed and that is involved in the present proceedings.

By the documents which the Commission is now promulgating it adopts a series of measures which represent the conclusion of the Commission majority as to the action that the Commission should take in this field. There are four significant measures involved.

First, the Commission rules that CATV's must carry the signals of all local television stations without material degradation. The Commission exercises power over the CATV's by requiring licensed microwave relay companies to require their customers to comply with the Commission conditions.

Second, the Commission rules that the relay companies must require CATV's which they serve to avoid the delivery to their customers of the television signals of any program which duplicates the program of any local station. This rule of nonduplication does not refer merely to simultaneous duplication, but requires CATV's to avoid presenting a duplicate program either 15 days before or 15 days after the date of broadcast by a local station. Thus, this rule provides that the CATV's served by the relay companies subject to the rule must avoid duplication of any local TV program for a period of 30 days.

Third, the Commission asserts jurisdiction over all CATV relay companies and systems, including those that are wholly intrastate and that transmit signals entirely by wire. Although this conclusion is called "tentative," the background demonstrates that there is no practical possibility of dissuading the Commission from this conclusion. The Commission gives notice that the substantive measures already adopted will be extended to the full limits of this asserted jurisdiction as soon as the procedural amenities can be completed.

Fourth, the Commission institutes an "inquiry" seeking further comment on more than a dozen and a half questions, all of them relating to the possibility of imposing further restrictions upon the operations of CATV's.

It seems to me that in its approach to the CATV problem the Commission is doing the wrong thing for the wrong reason in the wrong manner to deal with the wrong problem. It is thereby erecting only a glass wall barrier against the evils which it fears.

The Commission is doing the wrong thing when it seeks to control, directly or indirectly, the specific programs which shall be presented to the audience. The Commission is acting for the wrong reason because it seeks only to limit competition. The Commission is proceeding in the wrong manner because it is acting to extend its jurisdiction.



diction beyond statutory language and contrary to precedent. The Commission is dealing with the wrong problem because it concentrates attention only on the single matter of competition for listener attention and substantially disregards more important and more basic problems. Finally, the Commission is erecting only a gossamer barrier against feared evils because the actions taken and proposed are not only wrong but must ultimately prove to be ineffective. Assuming that the Commission will assert jurisdiction over all CATV companies, it will impose nonduplication rules, and disregarding the risk that its action will be set aside for lack of jurisdiction, at best these rules will give slight and marginal protection against competition, and at worst they will be wholly overturned on the whim of some future Commissioner. This is not a sound basis on which to build an industry.

Basically I concur in two of the four rulings made by the Commission today and dissent from two of the four. I agree that the Commission should, within the scope of its jurisdiction, require CATV carriage of local television stations without degradation, and that it should implement the rule so as to insure its effectiveness. I have no disagreement with the substance of the rules regarding carriage of local stations. I also agree that the Commission should undertake an inquiry into the role and scope of CATV's, although I have some reservations as to the inquiry now initiated by the Commission. I disagree with the nonduplication rule which I believe is an improper attempt to limit competition by controlling programming; and I disagree with the Commission's attempt to extend its jurisdiction without congressional authorization.

While I heartily agree that the Commission should conduct a sweeping inquiry into the role and scope of CATV's in the field of mass communications, it seems to me that the present inquiry is too limited and too late. It is too limited because it does not deal with fundamental issues. Many of the important issues in the field are mentioned in the course of inquiry, but they are scattered through the somewhat diffuse discussion in random fashion, even occurring in footnotes. But the basic issues are not mentioned. These are what the functions of CATV's should be, and what ultimate mode and system can be developed or encouraged to provide the greatest service to the greatest number. In various paragraphs of the instant orders and opinions CATV's are discussed as being ancillary or subsidiary facilities to broadcasting and as being a service competitive with broadcasting. These concepts seem inconsistent to me, and differing regulatory consequences flow from them. For example, if the services are truly competitive, then there is some reason to prohibit or discourage joint ownership of broadcasting facilities and CATV's. On the other hand, if the services are ancillary, then that reason does not exist, and broadcasters should be permitted, and perhaps encouraged, to own CATV's. At the present time the Commission is deferring action on a large number of broadcast license renewals because the licensees own CATV facilities. This action seems inconsistent with some of the positions adopted in these proceedings.

In any event, the present inquiry is too late because the Commission has already formed its opinion on this subject. I believe the Commission

Commission should make its investigation and conduct its inquiry before reaching its conclusions, rather than afterwards. The documents issued today plainly show that the Commission and its staff have long and fixed views regarding the subordinate place of CATV's in the mass communications system, and these views are not likely to be much influenced by anything that can be presented to the Commission in the course of the inquiry. Even if some Commissioners hold other views, it would seem to me to be more courteous, more productive, and more wise to refrain from officially promulgating them until the final "inquiry" has been completed.

In any event, I cannot agree that it is proper for the FCC to determine, either directly or indirectly, which programs shall be carried by a CATV system. It seems to me that the basic issue is whether the Commission should employ economic and engineering rules in order to achieve economic and engineering objectives, or should exert direct control over the substance of programming in an effort to achieve its objectives. The method of selective program control, which the majority adopts here, will beget future problems and more control. Problems will arise because of delay, changes in plans for broadcasting of particular programs, the requirements of section 315 and "fairness," and section 317, and other provisions, to pose only a few examples that can readily be foreseen of the numerous problems likely to arise under this rule. Suppose that a local station advises a CATV that the latter cannot carry some program because the station needs to carry it, and then the station, for whatever reason, does not carry the program? As a practical matter, the CATV will not have any other opportunity to carry the program once the date of its broadcast has passed. Will the FCC then require the local station to carry this program? Will that depend upon the Commission's determination of the value of the particular program? We know from experience that documentary and political programs are those most likely to be delayed or omitted. Will the Commission permit these programs to be taken off the CATV at the whim of the local station owner without insuring that he does carry them? It seems unlikely to me that the majority will be willing to do this. However, I doubt that those broadcasters who now clamor for a Commission rule on duplication will welcome this new grounds for Commission regulation of their programming.

Even more provocative questions are posed with respect to political programming. Suppose a distant station, carried on a local CATV, is carrying a series of political programs on a presidential election which is balanced as between the major parties. A local station decides to carry those network programs presenting the views of one of the two major parties. It notifies the CATV which then blanks out these programs on its circuits. The local station will then have to balance out its own programming by presenting the views of the other major party over its broadcasting facilities. But the programs carried by the distant station carried on the local CATV will be unbalanced because they will present only the programs presenting the views of one party. Most important, the local public will then have an unbalanced presentation since it will have the programs favoring one party pre-

sented over two stations on the local system, whereas the program favoring the other party will be presented over only one of the local channels and there will be only half as many of the latter. This is obviously a device that could easily be used to give the public a very biased political presentation during a campaign. Is the FCC then going to supervise CATV systems to see that their programs comply with all of the requirements of section 315 and "fairness"? How will this be accomplished? Will the FCC require program origination by CATV's? These and a host of other problems flow directly and inevitably from the approach adopted here. To say that any single situation is unlikely is not an adequate response. The records of the FCC and its own attempts to influence programming are eloquent testimony that situations such as those suggested, and others more bizarre and unusual, do occur and recur.

It should be noted that the rules now adopted by the Commission are based in significant part upon its concern for the preservation of "local live" programming, and that the notice of inquiry suggests that the protection which the Commission is now bestowing upon broadcasting stations is likely to be "accompanied by a concomitant duty, the part of the station" to provide "local live" programming. See notice of inquiry, paragraph 53. Thus, the nonduplication rule is not only a direct intrusion into the programming area through control of CATV's, but is also another argument to buttress the case for further Commission control of the programming of broadcasters. Believing, as I do, that the Commission should not seek to control program content in the field of broadcasting, I am opposed to this approach. See separate opinions in *Lee Roy McCourry*, 2 R.R. 2d 8 (1964); *George E. Borst, et al.*, FCC 65-207 (1965); *The Role of Law in Broadcasting*, 7 J. of Broadcasting, 113 (1964); *Religious Liberty and Broadcasting*, 33 Geo. Wash. L.R. (March 1965).

One practical factor that seems to be left out of consideration is the adoption of a nonduplication rule is that this is the approach which is most likely to provide incentive, if not virtual necessity, for CATV's to undertake the origination of their own programs. The operation of the nonduplication rule means that the CATV operators are required to delete material from the programs which they receive and deliver to subscribers and it also means that when such material is deleted the CATV is left with a vacant channel. While the economic pressures and motivations will undoubtedly vary from situation to situation, this kind of situation provides both the opportunity and incentive for program origination; and therefore, in the long run, is likely to engender more competition for the local television stations than it avoids. It seems to me to be far more simple and effective, not to mention wise and appropriate, to require that CATV's shall carry local stations, that they shall not alter or degrade the signals that they carry, and that they shall meet such other engineering requirements as may be found appropriate, and to leave determination of programming to the broadcasters without forcing the CATV operators into the area of program selection and encouraging them to enter the area of program origination.



The most important and fundamental legal objection to the present Commission action is its lack of adequate jurisdictional basis. The rule promulgated by the Commission at this time undertakes to regulate the programs that may be carried by CATV's by requiring common carriers that serve the CATV's to impose upon their customers, as a condition of service, the limitations contained in the Commission rules. The Commission has repeatedly rejected this basis of jurisdiction in the past, as appears from the cases cited and quoted below. But regardless of lack of support in precedent or statutory language, the logical implications of this approach should warn of its unsoundness. If the Commission can impose its will on a person or business entity that is the customer of a common carrier by the simple device of requiring the common carrier to act as the Commission's policeman in order to keep its license, then the Commission can regulate any business in the United States. Every business and most citizens are customers of the telephone and telegraph companies. It has never previously been suggested that this fact subjected them to regulation by the FCC. But if today's decision stands, then that is the law. The Commission need no longer be constrained by any technical limitations on its jurisdiction arising from statutes enacted by Congress, if this theory is sustained by the courts. The rule adopted by the Commission today applies to CATV's served by the telephone company as well as to those served by CATV relay companies. But there is nothing in the logic of the Commission's jurisdictional approach that limits this technique to CATV's. If this jurisdictional foundation is sound for CATV's, the Commission may, by precisely the same technique, impose its regulations on theaters or newspapers, on stock brokers or taxicabs, indeed on any business or person that needs and uses the services of a communications common carrier.

The Commission's assertion of direct jurisdiction over companies that receive broadcast signals and transmit them wholly by wire within a single State, without any specific statutory foundation, is equally alarming in its implications. The principal argument urged in support of the Commission's jurisdiction over such companies is that it is desirable for the FCC to have such jurisdiction in order to attain the broad general objectives of the Communications Act. However, if this reasoning is sound, then the jurisdiction of the Commission is literally unlimited. There is scarcely any aspect of organized social living that is not in some way related to the complex ramifications of the communications system that is now under the jurisdiction of the Commission. If the Commission has authority to deal with any activities which "threaten to impede realization of the Commission's \* \* \* plan and policies" (memorandum on jurisdiction) then it can control all amusements, the field of journalism, the scheduling of movements by trains, planes, and ships, not to mention almost any other activities that is either competitive or ancillary to or an important user of communications. Such vague and broad reasoning simply will not sustain jurisdiction as to activities not plainly within the scope of some more specific statutory language. See *F.P.C. v. Mahanhandle Co.*, 337 U.S. 498 (1949).

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When the Communications Act itself is examined it is found that not only is language lacking to give the Commission jurisdiction when it undertakes to assert here but the language of the statute expressly denies that jurisdiction.

Section 1 of the act, 47 U.S.C. 151, states the purpose of the act in most general terms and states that the FCC is created pursuant to that purpose. However, it does not define or confer any jurisdiction.

Section 2 of the act, 47 U.S.C. 152, says in its first subdivision that "the provisions of this chapter shall apply to all interstate and foreign communication by wire or radio \* \* \*." It does not state that the Commission has jurisdiction over all such communication. Rather, it describes in general terms the scope of the act and the outermost limitations of its application. However, it says that within these outermost limits the act applies pursuant to its provisions. In other words, in order to find jurisdiction within the scope described by the first subdivision of section 2, it is necessary to find some specific provision in the act conferring jurisdiction.

This is emphasized by the second subdivision of section 2, which specifically says that nothing in the act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through connection by radio \* \* \* with facilities located in an adjoining State \* \* \* of another carrier \* \* \*." It would seem that the latter clauses specifically exclude both CATV relay companies and CATV's from the jurisdiction of the Commission when they do not use microwave. However, it is argued that the intrastate relay companies using wire, rather than microwave, are connected by radio with broadcasters in another State rather than with carriers in another State. The obvious answer is that at the time of enactment of the Communications Act such things as CATV's were unheard of and that the intent of Congress expressed in the second subdivision of section 2 is to deny the Commission jurisdiction over intrastate carriers which are not part of a single integrated system and which simply carry signals emanating from another State. The congressional intent to exclude the Commission from regulation of intrastate facilities and operations is indicated by a number of provisions in the Communications Act. In addition to the restrictions of 47 U.S.C. section 152(2), a statutory denial of Commission jurisdiction to regulate intrastate facilities or operations appears in 47 U.S.C. section 214, as to communications common carriers, in 47 U.S.C. 221(b), as to telephone companies, and even in 47 U.S.C. section 301(d), as to radio signals which do not have a direct effect on interstate communications.

However, it is not necessary to rely upon inferential construction. Examination of the entire Communications Act for a specific provision applicable to companies engaged in transmitting signals intrastate by wire discloses that only section 214, 47 U.S.C. 214, is applicable. This section provides that no carrier shall construct or operate a line without obtaining authority from the Commission; provided, however, that no authority from the Commission is required for the construction or operation of "a line within a single



te unless such line constitutes part of an interstate line." The tion further provides that "As used in this section the term 'line' ans any channel of communication established by the use of appropriate equipment other than a channel of communication established by the interconnection of two or more existing channels. \* \* \*" us, by specific statutory provision, the mere fact that a CATV system or relay company is connected by radio to some other communications facility does not constitute its lines a part of a channel of communication comprising both the out-of-State facility and the intrastate facility. The company which operates by wire within a single State is, therefore, specifically excluded from Commission jurisdiction by section 214. By familiar rules of statutory construction such a specific and explicit exclusion prevails over any inference it might otherwise be spun out of more general language that is limited to imply jurisdiction.

The Commission memorandum on jurisdiction argues from the definitions of "wire communication" and "radio communication" in U.S.C. section 153, to the conclusion that the Commission has jurisdiction over CATV's because their activities may be said to come within the scope of these definitions. This argument is wholly beside the point. The section on definitions confers no jurisdiction at all. No terms are defined in that same section, including the terms "United States," "person" and "State commission." It is obvious that the FCC does not have jurisdiction over the United States, over interstate commissions or over all persons. The terms defined have legal significance only to the extent that they are used in other sections of the statutes. But one will search the act in vain for any section which expressly confers jurisdiction upon the Commission in the broad terms mentioned in the memorandum on jurisdiction. Consequently, the definitions given those terms are not germane to the issue.

If the argument in the Commission's memorandum is correct, then the Commission has jurisdiction not only over intrastate wire relay systems and CATV operating systems but also over television and radio receivers. The argument made in the Commission memorandum is that any instrumentality which is incidental to or used in the process of transmitting picture or sound or which forms a connecting link in the chain of communication between the transmitting station and the viewing public is subject to Commission jurisdiction. Television and radio receiving sets are just as much within this jurisdictional concept as CATV's and broadcasting stations. In that event the "all-channel law" (Public Law 87-529, 47 U.S.C. 303(s)) was unnecessary as the Commission had full authority to regulate and license these receivers by the terms of the original Communications Act. Clearly, neither the Commission nor the courts have ever previously thought this to be the case. Both have continuously acted on the contrary assumption.

The Commission itself has explicitly denied its right to control and jurisdiction over CATV's in several decisions which up to the present time have not been specifically reconsidered or overruled. The first reported decision is *Intermountain Microwave*, 24 FCC 54, reported January 30, 1958. In this case, a television broadcaster, Hill

County, objected to the grant of a microwave authority to a CATV relay company. The Commission opinion said:

Hill County is seeking to have the Commission deny a radio authorization to a communications common carrier because the communication circuit to be derived under such authorization will be utilized by subscribers who are competitors of Hill County in endeavoring to provide visual entertainment \* \* \*. We are of the opinion that the request of Hill County must be denied \* \* \*. In considering this problem, it must be remembered that it is possible and feasible for communications common carriers to provide program relay facilities to subscribers where no special authorization is required from this Commission, e.g., where the carrier already has in place properly authorized general cable, wire, or radio facilities which may be used for such particular use in the ordinary course of business. Thus, to sit out for special consideration and denial only those situations where new construction is involved, where such new construction is specifically for the purpose of providing a service to the public, when the initial or sole use of availing himself of service is a community television distribution system, would be arbitrary, capricious, and discriminatory. An alternative, of course, would be to adopt an overall policy, rule, or condition with respect to every cable, wire, or radio authorization, issued by this Commission to common carriers under its jurisdiction, under both title II and title III of the Communications Act, prohibiting the rendition of the specific type of service here under attack by the objectors. Such a procedure would be equally arbitrary, capricious, and discriminatory and unwarranted in view of our ultimate determination herein.

A few months later, in *Frontier Broadcasting Company*, 24 FCC 251, 16 R.R. 1005 (1958) the Commission specifically pointed out that even if it held CATV systems to be common carriers they would come within the scope of section 214 of the Communications Act and, therefore, would not require Commission authority to construct or operate intrastate lines. The Commission further said that when CATV systems transmitting signals by wire do not emit excessive radiation they involve no radio transmission which requires any form of license from the Commission under the act.

Thereafter the Commission conducted an extensive inquiry and after preliminary proceedings entered a report and order considering the whole subject of CATV and repeater service, 26 FCC 403, 18 R.R. 133 (1959). The following are some of the conclusions then reached and stated by the Commission:

\* \* \* we find no present basis for asserting jurisdiction or authority over CATV's except as we already regulate them under part 15 of our rules with respect to their radiation of energy (par. 71).

\* \* \* it would not constitute a legally valid exercise of regulatory jurisdiction over common carriers to deny authorization for common carrier microwave, wire, or cable transmission of television programs to CATV systems on the ground that such facilities would abet the creation of adverse competitive impact by the CATV on the construction or successful operation of local or nearby stations (par. 77).

Certainly, with respect to anything more than the barring of simultaneous duplication, we believe this to be an unwarranted invasion of viewers' right to get "live" programming if they are willing to pay for it. The suggested rule restricting presentation of the programs of the local station's network would appear to be cumbersome, if not completely unworkable, especially considering that many stations in small markets, including some of those covered in the record, present programs of two or even three networks (par. 96).

We have considered herein the problem, the issues raised, and suggested methods of solution. Two of the broadcasters' suggestions, both relating

to CATV's, we adopt. These are that CATV systems should be required to obtain the consent of the stations whose signals they transmit and that they should be required to carry the signal of the local station (without degrading it) if the local station so requests. *Since both of these steps require changes in the Communications Act, we will shortly recommend to Congress appropriate legislation, as indicated above (par. 99).* [Emphasis added.]

In 1962 the Commission, with one dissent and one abstention, issued the *Carter Mountain* decision, which is the principal reliance of those who now argue for FCC jurisdiction in this matter. *Carter Mountain Transmission Corp.*, 32 FCC 459 (1962). In this case a CATV relay company applied for authority to transmit television signals by microwave to a small community with one local television station. The television station protested the application and a hearing was held. On the basis of a complete evidentiary record the Commission found that grant of the microwave authority to the relay company with the linking of CATV service to the community would result in the demise of the local television station. It, therefore, found that a grant of the microwave authority would not be in the public interest. The Commission stated that the two basic issues in the case were whether the relay company was a bona fide common carrier and whether the economic impact of the grant was of legal significance or the public interest was inherent in the fact that applicant was a common carrier. The Commission held that economic impact of the proposed grant on the broadcasting station was of legal significance and was adequate ground for denying the authority sought. The holding was explicitly limited to this. The Commission said in its opinion: "There is no attempt to examine, limit, or interfere with the actual material to be transmitted. We are merely considering the question of whether the use of the facility is in the public interest, a conclusion which must be reached prior to the issuance of the grant." The Commission did not consider or discuss the decisions cited above and the only comment on *Carter Mountain* on the earlier decisions is this: "To the extent that this decision departs from our views in the report and order in docket no. 12443, 26 FCC 403 (released Apr. 14, 1959), those views are modified."

The decision was appealed and affirmed by the court of appeals. In the court of appeals six issues were agreed upon between the parties and submitted to the court by stipulation. These are set forth in the appellate opinion. *Carter Mountain Transmission Corp. v. FCC*, 21 F.2d 359 (CA10 1963), cert. den. 375 U.S. 951 (1963). None of the issues related either to the imposition of conditions upon or control over the programs to be carried by the applicant or to the possibility of extending FCC jurisdiction to companies not utilizing radio transmission for the carriage of signals. In fact, the Commission in its brief to the Supreme Court in opposition to certiorari specifically stated that no question of Commission jurisdiction over CATV's operating by wire was involved in that case. The brief stated " \* \* \* Several bills have been introduced in Congress to give the Commission direct authority over CATV's, a question not involved here, \* \* \* " (FCC brief, p. 10.) [Emphasis added.]

A month after issuing its *Carter Mountain* decision, the Commission issued a unanimous order in *WSTV, Inc. v. Fortnightly Corp.*, 23 1 FCC. 2d



R.R. 184 (1962) in which it relied upon and reaffirmed the holding of the *Frontier Broadcasting* decision, and reiterated that "this Commission [is] without title II jurisdiction over the CATV system." Accordingly, the Commission ordered that the complaint by a broadcaster against a CATV system "is dismissed for failure to state a cause of action within the jurisdiction of the Commission."

In the report and order adopting rules to be imposed on CATVs through the common carriers which serve them, the Commission mentions the matter of jurisdiction in a footnote (footnote 5). This cavalier reference relies entirely on the authority of the *Carter Mountain* case as the legal foundation for jurisdiction to issue the rules. But this reliance is wholly misplaced. The *Carter Mountain* decision held only that the Commission could wholly deny a common carrier application when the sole proposed use of the common carrier was to serve a CATV and such service would, on the facts of record in that case, result in the economic destruction of a local broadcast station. The issue of Commission authority to impose conditions on or control the character of the signals carried by the relay company, not to mention the customer, was not raised or decided in that case, was not considered by the Commission (see par. 3, 32 FCC 460) and, in fact, was expressly disclaimed by the Commission (par. 8, 32 FCC 462). The Commission did say that its denial of the application was without prejudice to the right of applicant to file a new application when conditions had changed so that the operation of the CATV would not have the impact on the local television station which the record there demonstrated was likely to follow in circumstance prevailing at the time of the decision. However, this is a far cry from a holding that the Commission can impose conditions as to the signals to be carried by the communications carrier or by its customer. As noted in the preceding discussion, the Commission told the Supreme Court in the *Carter Mountain* brief that the issue of FCC jurisdiction over CATVs was not involved, and shortly after the *Carter Mountain* decision a unanimous Commission reaffirmed that it did not have jurisdiction over the carriage of signals by CATVs. There is no reasonable Commission opinion that considers this issue and concludes that the Commission does have the jurisdiction actually exercised in the instant report and order. Several Commission opinions hold to the contrary. In these circumstances, the casual disposition of the jurisdictional issue in a footnote seems inadequate at best and irresponsible at worst.

The Commission memorandum cites cases like *American Trucking Assn. v. U.S.*, 344 U.S. 298, and *NBC v. U.S.*, 319 U.S. 190, to sustain jurisdiction. However, the point at issue in those cases, and others like them, was simply whether a regulatory agency having jurisdiction over a field of activity and an enterprise within that field could act with reference to a particular practice not specified in the basic statute. The Supreme Court held that, regardless of the absence of specific reference to a particular practice in the act, the regulatory agency having jurisdiction of the field and the enterprise might promulgate regulations dealing with a practice which was considered to be an evil requiring correction. The Court points out that the necessity of formulating regulations to meet specific practices not foreseen

Congress is precisely one of the reasons regulatory agencies such as the Commission are created. However, this reasoning has nothing whatever to do with an issue as to the existence of jurisdiction over an economic or technical field or a particular enterprise.

A case much closer to the present situation than any cited in the Commission's memorandum is *F.P.C. v. Panhandle Co.*, 337 U.S. 498 (1949). In that case the Supreme Court held that the FPC could not extend its power by the kind of reasoning relied on by the FCC here, even though the FPC was seeking to regulate a company concededly within its general jurisdiction but as to an aspect of the company's business that was not within the terms of the statutory jurisdiction. The Court said, *inter alia*:

Nothing in the sections indicates that the power given to the Commission over natural-gas companies by section 1(b) could have been intended to swallow all the exceptions of the same section and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce.

Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed. In the light of that history we should not by an extravagant, even if abstractly possible mode of interpretation push powers granted over transportation and rates so as to include production \* \* \* We cannot attribute to Congress the intent to grant such far-reaching powers as implied in the act when that body has endeavored to be precise and explicit in defining the limits to the exercise of Federal power.

The Court stated that if the Commission were of the opinion that it could have the power sought, then it was authorized to call the attention of Congress to that fact. The reasoning adopted by the Court in the *Panhandle* case applies with even greater force to the FCC in the instant situation. Here there is not merely an inference from earlier inaction that the Commission did not believe it had the power now asserted. Here there are clear and explicit declarations by this Commission that it does not have the power which the present majority of the Commission now claims. The only thing that has changed since the Commission last disclaimed the jurisdiction it now asserts is the personnel of the Commission. That is not a proper basis for disregarding precedent and changing established legal principles. See my separate opinion in *Assignment of Additional VHF Channel to Johnstown, Pa., etc.*, 1 R.R. 2d 1572, 1580 (1963).

Contrary to the apparent belief of the Commission majority, the fact that it might be thought desirable for the FCC to have control of CATV's or their practices does not indicate that the agency does possess such power. See *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952). Despite some reservations as to the wisdom and objectivity of the Commission and its staff regarding CATV's, I would agree that, as a matter of principle, the FCC should have the authority to regulate CATV's as a service closely related to broadcasting. I favor and will support appropriate congressional legislation to give the Commission jurisdiction in this field.

This position differs from the assertion of jurisdiction made by the Commission in the instant proceedings in several important respects. First, it is founded on a deferential respect for the constitutional theme by which Congress must specifically delegate power before



it is exercised by an agency created by Congress. Second, the power that Congress delegates is almost certainly going to be specified and limited in extent, whereas the power derived by inference from broad general statutory terms is unlimited except by the self-restraint of the Commissioners and the vigilance of the courts. Finally, it is likely that congressional hearings will illuminate this problem and that Congress will provide some guidance to the Commission that may suggest a better course than the one the Commission is now determining to follow.

At least part of the problem that the Commission now foresees in the proliferations of CATV's is the result of the Commission's own past policies. In the past the Commission has adopted the same restrictive attitude toward translators and other auxiliary service that were within its jurisdiction that it now proposes to take toward CATV's. The popular demand which has been responsible for the recent rapid growth of CATV's has been largely the result of the denial of service to many areas because of the FCC's strictness and reluctance in granting authority for the construction and operation of translators and boosters. Apparently the Commission has not yet learned that the expansion of service is not to be attained by the limitation of competition and the imposition of rigorous regulation but rather by stimulating competition and moderating regulation. The Commission can do many things to stimulate and encourage the extension and expansion of television service throughout the country but regulating the programs that can be brought into homes by CATV's and extending the Commission's jurisdiction without specific congressional authority are not likely to help.

However, it seems to me that the most basic and important issue involved here is far more important than the interests of the broadcast stations, the CATV's, or even of the audience in securing broadcasting service. The basic issue involved here is whether a great Government agency will show reasonable respect for its own precedents and reasonable restraint in seeking to extend the scope of its own power. Undoubtedly the independent regulatory agencies have been given great power and broad discretion in its exercise. But if democratic government is to survive, the corollary of great power and broad discretion must be a strong impulse of self-restraint in the exercise of such power. In the face of statutory language, the Commission's own precedents, the prior statements of the Commission to the courts and its requests to Congress for legislation on this subject, it seems to me to be presumptuous for the Commission now to assert jurisdiction which it has previously explicitly disclaimed. If the laws are inadequate to cope with the problems of the moment, it is the function of Congress to remedy that lack. There is no reason to assume that Congress is any less responsive than the Commission to the public interest, or that it is unable or unwilling to act if action is needed in this field at this time. I am, accordingly, compelled to dissent from the Commission's efforts to extend its jurisdiction without specific congressional authority.

## APPENDIX B

### SECOND REPORT AND ORDER

DOCKET NO. 15971, 2 F.C.C. 2D 725

(47)



FCC 66-220

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:

AMENDMENT OF SUBPART L, PART 91, TO ADOPT  
RULES AND REGULATIONS TO GOVERN THE  
GRANT OF AUTHORIZATIONS IN THE BUSINESS  
RADIO SERVICE FOR MICROWAVE STATIONS TO  
RELAY TELEVISION SIGNALS TO COMMUNITY  
ANTENNA SYSTEMS.

Docket No. 14895

AMENDMENT OF SUBPART I, PART 21, TO ADOPT  
RULES AND REGULATIONS TO GOVERN THE  
GRANT OF AUTHORIZATIONS IN THE DOMESTIC  
PUBLIC POINT-TO-POINT MICROWAVE RADIO  
SERVICE FOR MICROWAVE STATIONS USED TO  
RELAY TELEVISION BROADCAST SIGNALS TO  
COMMUNITY ANTENNA TELEVISION SYSTEMS.

Docket No. 15233

AMENDMENT OF PARTS 21, 74, AND 91 TO ADOPT  
RULES AND REGULATIONS RELATING TO THE  
DISTRIBUTION OF TELEVISION BROADCAST SIG-  
NALS BY COMMUNITY ANTENNA TELEVISION  
SYSTEMS, AND RELATED MATTERS.

Docket No. 15971  
(RM Nos. 636, 672,  
742, 755, and 766)

SECOND REPORT AND ORDER

(Adopted March 4, 1966)

BY THE COMMISSION: COMMISSIONER BARTLEY DISSENTING AND ISSUING  
A STATEMENT; COMMISSIONER COX DISSENTING IN PART AND CON-  
CURRING IN PART AND ISSUING A STATEMENT; COMMISSIONER LOEVIN-  
GER CONCURRING IN THE RESULT AND ISSUING A STATEMENT.

1. On April 23, 1965, the Commission issued a notice of inquiry and notice of proposed rulemaking in docket No. 15971 (30 F.R. 1078), which divided the proceeding into two parts. In part I the Commission reached an initial conclusion that it has jurisdiction over community antenna television (CATV) systems, whether or not microwave facilities are used, and proposed to extend to nonmicrowave CATV systems the substantive provisions of the carriage and nonduplication rules adopted for microwave-served CATVs in dockets Nos. 14895 and 15233. *First Report and Order* in dockets Nos. 14895 and 15233, 30 F.C.C. 683; *Memorandum Opinion and Order* in dockets Nos. 14895 and 15233, 1 F.C.C. 2d 524. Part I also invited comment on various auxiliary questions affecting all CATVs which were not resolved in dockets Nos. 14895 and 15233. These have to do with color duplication, educational television stations, station-owned translators, and a possible transition period before the carriage pro-

2 F.C.C. 2d

visions are made fully applicable to existing CATV systems with limited channel capacity (notice, pars. 33-36).

2. In part II of the proceeding the Commission initiated an inquiry looking toward possible rulemaking on broader questions posed by the trend of CATV development, including (1) the effect of CATV entry into major cities on UHF independent stations, (2) the possible need for limitations on the distance a station's signal may be extended (CATV), (3) "leapfrogging,"<sup>1</sup> (4) program origination or alteration (CATV and the related question of pay-TV or combined CATV-pay-TV operations, and (5) various miscellaneous questions. In paragraph 49 of part II the Commission adopted an interim policy, pending the outcome of the proceeding, which provides that a microwave application to serve a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area. A like showing was required for microwave facilities to serve a CATV system in an "overshadowed" community where, because of its proximity to three or more existing stations, any new UHF station would be independent in operation. In paragraph 50 of part II, the Commission proposed an interim rule along similar lines to govern nonmicrowave CATV entry into such areas.

3. Comment on part I and paragraph 50 of part II was due at an earlier date than that specified for the remaining portions of part II, which, it was anticipated, would require more lengthy consideration and possibly a further notice to afford an opportunity for comment on any specific rule proposals of the Commission (notice, pars. 64, 68). Comments and reply comments on part I and paragraph 50 have not been fully considered by the Commission. This report and order deal only with these aspects of the proceeding.

#### PART I. THE CARRIAGE AND NONDUPLICATION PROVISIONS

4. In proposing that the substantive provisions of the carriage and nonduplication rules governing microwave CATV systems be extended to all CATV systems, the notice emphasized (pars. 27, 30) that two main issues were presented: (1) Whether the Commission could appropriately proceed on the basis of its present statutory authority and (2) whether any special problems of substance or procedure are posed by rules going to nonmicrowave systems. We turn now to discussion of the first issue.

5. The threshold jurisdictional question is twofold: (a) Whether the Commission has jurisdiction as a matter of law over nonmicrowave

<sup>1</sup> "Leapfrogging" means the distribution by the CATV system of more distant signals in preference to signals of stations located much closer to the system.

<sup>2</sup> Comment and reply comments on pt. I and par. 50 were originally due on June 25 and July 26, 1965, respectively. By orders issued on June 16 and June 30, 1965, these time for filing were extended to July 26 and Sept. 17, 1965. Formal comments and/or reply comments have been received from the parties listed in the attached app. A. In addition, a large number of informal comments or letters from members of the public have been received and placed in the docket.



CATV systems under the present provisions of the Communications Act, and (b) whether it would be appropriate to exercise any such jurisdiction without a legislative enactment on the subject. In the notice we concluded initially, for the reasons set forth in our memorandum on jurisdiction attached to the notice, that CATV systems are engaged in interstate communication by wire to which the provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). It further appeared to us that the Commission's statutory powers, particularly under sections 4(i), 303(f), (h), and (r), include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1 and 307(b) of the act and to prevent frustration of the regulatory scheme by CATV operations, irrespective of the use of microwave. However, we pointed up the following matters (par. 31 of the notice):

While we have initially concluded that we have jurisdiction, we would carefully consider comments addressed to this aspect. The attached memorandum presents the case for jurisdiction—a strong one in our view—and is set out in order to afford interested parties a full opportunity to direct their comments to that case. Second, we adhere to our position that clarifying legislation would be desirable, and have no intention of bypassing congressional action in this field. We are clearly concerned here with new and important questions of policy and law in the communications field. That being the case, the Commission would welcome (i) a congressional guidance as to policy and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest. It is our understanding that hearings will shortly commence. The information gathered in this proceeding will, we think, be of assistance to the Congress in its consideration of the matter. In short, by instituting this proceeding, we shall gather essential data, both for the Commission and the Congress, and will have conserved valuable time and be in a position to take final effective action in either of two eventualities: (1) Congress has enacted legislation in this field which does not preclude the Commission from promulgating rules along the lines of those adopted in dockets Nos. 14895 and 15233; or (2) no legislation is forthcoming, and the comments in the rulemaking proceeding lead to the conclusion that the Commission does have present jurisdiction to extend the substantive provisions of the rules adopted in the above dockets to all CATV systems, whether or not they use microwave facilities. In the latter event, we would be remiss in our statutory duties if we had failed to exercise, without undue delay, our existing jurisdiction and authority to promote a public interest in this important area. The rulemaking proceeding instituted by this notice will thus be conducted concurrently with legislative consideration, with final Commission decision withheld for an appropriate period to afford Congress an opportunity to act.

6. Following the issuance of the notice, H.R. 7715 was introduced in the House on April 28, 1965, and hearings on the bill were held before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce in May and June 1965. In the Commission's testimony concerning the bill, it was stated that the Commission did "not contemplate applying any new rules that we may enact with respect to the rest of the CATV industry until 1966; in other words, until at least after this session of Congress is over and it has had the ability to consider this problem." Hearings before the Subcommittee on Communications and Power of the House Committee on Interstate and Foreign Commerce on H.R. 7715, 89th Cong., 1st sess., p. 25.) No bill relating to CATV has been introduced in the Senate, and the 89th Congress adjourned its first session without enacting any legislation on CATV.

7. We think it appropriate, therefore, to take up without further delay part I and paragraph 50 of the rulemaking proceeding. Here we note that CATV is developing and expanding at a very rapid rate (see pars. 31-39, within). We cannot ignore the increasing risk of adverse impact on the "public interest in the larger and more effective use of radio" (sec. 303(g)) which accompanies the burgeoning CATV development. See paragraphs 116-117: part II, within. Further it is contrary to sound regulation for carriage and nonduplication to be applicable to the microwave CATV system and inapplicable to the nonmicrowave, which constitutes the other three-fourths of the industry. And, if the carriage and nonduplication provisions are to be applied to nonmicrowave systems, it would obviously minimize the disruption to the viewing public to do so as soon as possible—before a large number of incipient CATV systems commence operation and their subscribers become accustomed to service not in compliance with the rules. It would also appear to entail less hardship to the new CATV operator to commence operation under the rules than to undergo a subsequent conversion. Moreover, removal of the present uncertainty would assist local franchising authorities, as well as franchise applicants. We have received several inquiries from local authorities as to when a decision might be expected, with an indication in some instances that action on franchise applications was being withheld pending our decision. The "introduction of as much stability as possible into the planning perspective of those affected by our regulation" is regarded by us as a "highly desirable objective" (first report and order in dockets Nos. 14895 and 15233, par. 78). For all these considerations, developed more fully within, we think it our responsibility under the Communications Act to resolve the issues in part I and paragraph 50.

#### *A. Jurisdiction as a Matter of Law*

8. While the comments filed in support of present jurisdiction outnumber those opposed,<sup>3</sup> there appears to be no need to review the substance of the supporting comments here. The bulk of the supporting comments either restate essentially the same matters set forth in the Commission's memorandum on its jurisdiction and authority

<sup>3</sup> *Supporting comments* were filed by: National Association of Broadcasters; Association of Maximum Service Telecasters, Inc.; Storer Broadcasting Co.; American Broadcasting Co.; Westinghouse Broadcasting Co., Inc.; Fuqua Industries, Inc.; WTVY, Inc.; Snyder & Associates; Western Slope Broadcasting Co.; Black Canon Broadcasting Co.; Mesa Verde Broadcasting Co.; Houston Post Co.; WKBH Television, Inc.; Bonneville International Corp.; Mobile Video Tapes, Inc.; D. H. Overmyer; Arcostook Broadcasting Corp.; Taft Broadcasting Co.; WJAC, Inc.; Springfield Television Broadcasting Corp.; Midwest Television, Inc.; West Central Broadcasting Co.; Rust Craft Broadcasting Co.; WGAL Television, Inc.; American Farm Bureau Federation; National Farmers Union; National Grange; Tri-State TV Translators Association; labor organizations affiliated with the AFL-CIO; Eastern Educational Network; and commenting jointly, television stations KHOU-TV; KOTV; KXTX; WANE-TV; WAVE-TV; WFIE-TV; WFRV; WISH-TV; WJXT; WMT-TV; WNOK-TV; WTOF-TV. *Opposition* Commenting in opposition to jurisdiction were: National Community Television Association, Inc.; Smith & Pepper (on behalf of 150 CATV systems); Columbia Broadcasting System; National Broadcasting Co.; TV Cable Service of Abilene, Inc.; Entron, Inc.; American Cable Television, Inc.; Meredith Broadcasting Co.; Triangle Publications, Inc.; Jerrold Electronics Corp.; International Teleprompter Corp.; Montgomery Television Association, Inc.; and Journal Co. *Other* American Telephone & Telegraph Co. and U.S. Independent Telephone Association took no position on the jurisdictional question but requested that the carriage and nonduplication provisions be applied to CATV systems directly rather than to microwave common carriers.

notice, attachment B) or express agreement with that memorandum.<sup>4</sup> Since we believe that the case for jurisdiction is sufficiently set forth in our memorandum, a copy of which is attached to this document or convenient reference (attachment C), we shall discuss only the arguments made in the opposition comments.

9. The comments urging a want of jurisdiction make three principal arguments. It is asserted, first, that the Communications Act contains no provision granting the Commission authority over CATV systems. Second, it is contended that there are specific provisions in the act which show a lack of authority. And, third, it is urged that the Commission itself has repeatedly denied jurisdiction over CATV systems, that Congress is aware of and has acquiesced in this administrative interpretation, and that principles of statutory construction preclude the Commission from now claiming jurisdiction. We shall discuss these arguments in order.

10. The contention that the Communications Act contains no provision granting the Commission authority over CATV systems takes issue with the sufficiency of the statutory base set forth in the Commission's memorandum (pp. 2-7). We there relied on the fact that section 2(a) states that the "provisions of this act shall apply to all interstate and foreign communication by wire or radio \* \* \* and to all persons engaged within the United States in such communication," and concluded that CATV systems are engaged in "communication by wire," within the meaning of section 3(a), which is interstate in nature. With respect to the provisions of the act to be applied, we stated that the authority conferred by section 303(h) to issue rules establishing the area or zone to be served by any station includes the power to prevent infringement of the rules by "any person" (secs. 2(b) and 502 of the Communications Act), and specifically a person subject to the provisions of the act, and encompasses authority to specify by rule the conditions under which the station's signal may be extended beyond the prescribed service area or zone by CATV. Moreover, apart from section 303(h), the general rulemaking authority of the Commission (secs. 4(i) and 303 (f) and (r)) includes authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) by CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

11. It is asserted that these sections do not suffice to support jurisdiction because it is necessary to find some specific provision of the act expressly conferring jurisdiction over the subject matter of CATV. The authorities cited in our memorandum (pp. 4-6) to the effect that the authority does not depend on a specific reference to CATV or CATV practices in the act<sup>5</sup> are distinguished on the ground that they

<sup>4</sup> While Storer Broadcasting Co. does not agree with the impact argument (Commission's memorandum, pp. 4-5) as a jurisdictional base, it takes the position that the Commission now has limited jurisdiction over all CATV systems which is sufficient to support the measures proposed in pt. I and par. 50.

<sup>5</sup> *National Broadcasting Co. v. United States*, 319 U.S. 190, 218-219; *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203; *American Trucking Association v. United States*, 344 U.S. 298, 309-311; *United States v. Pennsylvania R. Co.*, 323 U.S. 612; *United States v. Wrightwood Dairy Co.*, 315 U.S. 110; *Houston, East and West Texas Railway Co. v. United States*, 234 U.S. 342; *Public Service Commission of State of New York v. Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).



concern authority over unspecified practices of regulated licensees rather than the power to regulate unspecified persons or businesses not licensed under the act. Unless specific authority is required for regulation of nonlicensees, it is argued, the Commission could utilize its general rulemaking authority to regulate any business (such as amusements, program producers, etc.) which has an impact on broadcasting or uses communications facilities.

12. The attempted distinction, even assuming *arguendo* its validity, does not fit the situation here. We are not presented with the question of whether the Commission's broad powers to take action necessary to carry out the provisions of the act include authority to regulate businesses not subject to the act merely because of some impact on the use of, interstate communications under the act.<sup>6</sup> CATV systems differ from most other businesses in that they are themselves engaged in "interstate communication by wire," a business to which the act's provisions are expressly applicable (secs. 2(a), 3(a)).<sup>7</sup> Moreover, they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b). We are not powerless to prevent frustration of our action under those sections by persons subject to the act merely because the licensing provisions of the statute are inapplicable to them. Sections 312 (b) and (c) provide for the issuance of a cease and desist order against "any person"—not merely any licensee or permittee—who has "violated or failed to observe any rule or regulation of the Commission authorized in this act \* \* \*."

13. It is further asserted that *Federal Power Commission v. Panhandle Eastern Pipeline Company*, 337 U.S. 498, precludes a conclusion that the general rulemaking power of the Commission encompasses authority to take necessary action, not inconsistent with the act or law, to prevent frustration of section 307(b) and 303(h) by CATV. However, the *Panhandle* case is readily distinguishable. That case was decided upon the basis of a specific provision in the Natural Gas Act which denied the Federal Power Commission jurisdiction to deal with the problem there involved.<sup>8</sup> Section 1(b) of the Natural Gas Act provides that the "provisions of this Act shall apply \* \* \* to the sale in interstate commerce of natural gas for resale \* \* \* but shall not apply \* \* \* to the production or gathering

<sup>6</sup> We have not claimed plenary power to regulate any business which may have some impact on broadcasting or other interstate communication by wire or radio. In the jurisdictional memorandum we stated that the "Commission clearly has no jurisdiction over bowling alleys or theaters, for example \* \* \*." Moreover, we sought and obtained specific statutory authority to regulate the manufacture of television receivers shipped in interstate commerce for sale to the public (Public Law 87-529, 47 U.S.C. 303(s)). There may be instances, of course, where the Commission's regulatory power appropriately extends to some activities of persons not engaged in communication by wire or radio. But there is no necessity to determine the limits or basis for such authority here.

<sup>7</sup> Since CATV systems fall within the definition of communication by wire and television operations are interstate in nature, it makes no difference that they are not expressly mentioned by name. The act applies to "all interstate communication by wire or radio" to "all persons engaged in such communication" [sec. 2(a), emphasis added]. For that matter, prior to the 1962 amendment incorporating sec. 303(s), the word "television" did not appear in the act. Yet, it has long been established that the act applies to television because it falls within the definitions of "radio communication" and "transmission of energy by radio" contained in sec. 3. *Allen B. Dumont Labs, Inc., v. Carroll*, 184 F.2d 155 (C.A. 3), cert. den., 340 U.S. 929.

<sup>8</sup> Other Federal Power Commission cases cited in the comments, *Amerasia Petroleum Corp. v. Federal Power Commission*, 334 F.2d 404 (C.A. 8), and *Pan American Petroleum Corp. v. Federal Power Commission*, 339 F.2d 694, are similarly inapposite since they involved a lack of jurisdiction predicated upon a statutory exclusion.

of natural gas" (52 Stat. 821, 15 U.S.C. sec. 717(b)). The court held that the transfer of gas leases fell within the exclusion as to the "production or gathering of natural gas" and hence lay outside the scope of the Power Commission's regulatory powers. In declining to find authority in the Power Commission's general rulemaking powers, the court stated that the "power to do the things appropriate to carry out the provisions of the act can hardly be taken to rescind a prohibition against certain actions" (337 U.S. at 508). By contrast, there is no provision in the Communications Act which specifically excludes CATV systems from the Commission's jurisdiction. On the contrary, section 2(a) states that the "provisions of this Act shall apply to *all* interstate communication by wire or radio \* \* \* and to *all* persons engaged within the United States in such communication \* \* \*." [Emphasis added.] Moreover, *Panhandle* has been construed narrowly in a recent case arising under the Natural Gas Act, which sustained the Power Commission's jurisdiction over gas leases for sale in interstate commerce. *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 403-404.

14. The argument that the Communications Act contains language expressly excluding jurisdiction over CATV systems is predicated primarily on the provisions of section 2(b) and section 214(a) of the act. Section 2(b) states that nothing in the act shall be construed to give the Commission jurisdiction with respect to "intrastate communication service by wire or radio of any carrier" or "any carrier engaged in interstate or foreign communication solely through construction by radio, or by wire and radio, with facilities located in an adjoining State \* \* \* of another carrier \* \* \*." Section 214(a) provides, in pertinent part, that "no carrier" shall construct or operate a line without a prior certificate from the Commission, provided, however, that no certificate is required for construction or operation of a line within a single State unless such line constitutes part of an interstate line." It further states: "As used in this section the term 'line' means any channel of communication established by the interconnection of two or more existing channels."

15. We are not persuaded that these sections demonstrate a statutory denial of jurisdiction over CATV systems. In the first place, both sections by their terms apply to "carriers" and we have repeatedly held that CATV systems are not "carriers" within the meaning of section 3(h) of the act. *Frontier Broadcasting Co.*, 24 F.C.C. 251; *TV and TV Repeater Services*, 26 F.C.C. 403, 427-428; *WSTV, Inc. v. Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184; *Philadelphia Television Broadcasting Co., et al.*, FCC 65-702 (Aug. 2, 1965). Nor are television stations "carriers" under section 3(h). Moreover, even if CATV systems were to be deemed carriers, their operations are interstate in nature since they are carrying interstate television signals. A common carrier carrying television signals does not fall within the exemption in section 2(b)(1) because its physical facilities are located in only one State; it "performs an interstate communication service." *Idaho Microwave, Inc. v. Federal Communications Commission*, 352 F. 2d 729 (C.A.D.C.); *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820; *Pacific*



*Telatronics, Inc.*, 4 Pike & Fischer, R.R. 145; and cf. *California Interstate Telephone Co. v. Federal Communications Commission*, 328 F. 2d 816 (C.A.D.C.).<sup>9</sup> See also, *United States v. American Telephone and Telegraph Co.*, 57 F. Supp. 451, 454 (S.D.N.Y.), *aff'd per curiam, sub nom. Hotel Astor v. United States*, 325 U.S. 837. But the same token a CATV system, if it were a carrier, would constitute "part of an interstate line" for purposes of section 214(a), even though its facilities were located within a single State.

16. The most vigorously pressed argument against jurisdiction is the assertion that the Commission is estopped by past disclaimers of jurisdiction over CATV systems and congressional acquiescence in those disclaimers (see par. 28 of the notice herein). Reliance placed on the principle of statutory construction that a consistent longstanding administrative interpretation is entitled to great weight particularly where Congress is aware of the administrative determination and has subsequently amended the statute without changing the applicable section.<sup>10</sup> Whatever the force of this principle in other circumstances, we do not think that it is dispositive of the legal question of our jurisdiction here.

17. Initially, it bears noting that some of the precedents cited as establishing a consistent contrary position primarily concerned matters upon which we do not rely as a basis for jurisdiction. We have consistently held that CATV systems are not common carriers within the meaning of section 3(h), and hence do not come within the provisions of title II applicable to carriers. *Frontier Broadcasting Company*, 24 F.C.C. 251; *CATV and TV Repeater Services*, 26 F.C.C. 40, 427-428; *WSTV, Inc. v. Fortnightly Corp.*, 23 Pike & Fischer, R.R. 184. But we have not proposed to depart from this ruling, which has been reaffirmed since the issuance of the notice herein. *Philadelphia Television Broadcasters Co., et al. v. Rollins Broadcasting, Inc.* docket No. 15926 (FCC 65-702, Aug. 2, 1965) now pending on appeal (case No. 19577, C.A.D.C.). Nor have we departed from our earlier rulings that CATVs are not engaged in "broadcasting" within the meaning of section 3(o) and are not encompassed within section 325(a). *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-430. In areas closer to the claimed basis for jurisdiction, the precedents do not reflect a consistent contrary position.<sup>11</sup> Thus, while we initially

<sup>9</sup> That the carrier in *Idaho Microwave* was carrying the signal of a television station located in another State is not of controlling significance. All television broadcasting is interstate in nature. *Ward v. Northern Ohio Telephone Co.*, 300 F. 2d 816 (C.A. 6), *cert. den.* 371 U.S. 820. *Capital City Telephone Co.*, 3 F.C.C. 189, 193, 194; *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 279. Moreover, in the case of network programming the communication link between the network and the station transmitter forms an additional part of the interstate chain of communication. *Ward, supra* 300 F. 2d at 819.

<sup>10</sup> Cases cited to us in this connection include: *Hanover Bank, Ex. v. C.I.R.*, 369 U.S. 67, 686, 687; *United States v. Leslie Salt Co.*, 350 U.S. 382, 396, 397; *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 315; *Luckenbach Steamship Co. v. United States*, 280 U.S. 173, 183; *Cammarano v. United States*, 358 U.S. 498.

<sup>11</sup> The position of Congress, if it has acquiesced in the Commission's rulings, is not clear. It is true, as set forth in the notice, par. 28, that following our decision in *CATV and TV Repeater Services*, 26 F.C.C. 403 the 86th Congress gave extensive consideration to some of the various legislative proposals on CATV submitted by the Commission and others, but enacted no legislation. Moreover bills introduced in subsequent Congresses received no action. However, Congress also took no action after being apprised of the partial reversal of that decision in *Carter Mountain*. 29th FCC Annual Report, 1963. Congress likewise is aware of our initial conclusion as to jurisdiction in the notice herein issued on Apr. 2, 1965. Although a subcommittee of the House Commerce Committee subsequently held hearings on H.R. 7715, no committee report issued in the first session of the 89th Congress, and no legislation on CATV was considered or introduced in the Senate.

disclaimed jurisdiction to deny a common carrier microwave authorization to relay television signals to CATV systems (*Intermountain Microwave*, 24 F.C.C. 54; *CATV and TV Repeater Services*, 26 F.C.C. 403, 431-433), this ruling was later reversed in our *Carter Mountain* decision, 32 F.C.C. 459, which was sustained on judicial review. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951. In *CATV and TV Repeater Services*, we disclaimed plenary power, under section 303 (a), (b), (f), (g), (i), and (r), to "regulate any and all enterprises which happen to be connected with one of the many aspects of communications" (28 F.C.C. at 429)—a power which is not claimed here. However, we assumed (without deciding) that CATVs are within the scope of section 3(a) (26 F.C.C. at 428), and also found it unnecessary to pass on the question of our authority to regulate them directly because of adverse effect on broadcasting (26 F.C.C. at 431). And, finally, we have not previously ruled on the question of whether section 303(h) encompasses authority to regulate CATV.

18. More important, even if our past rulings in this troublesome area had been consistent, we are not estopped from correcting a ruling of law which appears to be clearly erroneous. *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 321 F. 2d 359, 364 (C.A.D.C.), cert. den. 375 U.S. 951; *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672; *United Gas Improvement Co. v. Continental Oil Co.*, 381 U.S. 392, 404-406.<sup>12</sup> As the Supreme Court commented in the *Phillips Petroleum* case, in sustaining the Federal Power Commission's jurisdiction over the sale of gas by gas producers or resale in interstate commerce despite that agency's consistent past disclaimer of jurisdiction, "even consistent error is still error" (347 U.S. 672, 678, footnote 5). Moreover, in *United Gas Improvement* the authority of the Power Commission over gas leases for resale in interstate commerce was upheld, notwithstanding the fact that the agency had initially concluded in the same proceeding that it lacked jurisdiction and then reversed itself on remand (on another ground) from a court of appeals decision which assumed a lack of authority on the basis of *Panhandle* (381 U.S. at 404-406). *Public Service Commission v. New York v. Federal Power Commission*, 287 F. 2d 143, 145 (C.A.D.C.).

19. As indicated in the notice (par. 28), our "jurisdiction to regulate nonmicrowave CATV systems under the present provisions of the Communications Act is obviously subject to reasonable difference of opinion." However, the arguments discussed above do not persuade us that jurisdiction is lacking, and no other bar to jurisdiction has been brought to our attention. After careful consideration of all the comments we are convinced that the case for present jurisdiction is a strong one. Accordingly, for the reasons set forth above and in our memorandum as to jurisdiction (app. C), we conclude that CATV systems are engaged in interstate communication by wire to which the

<sup>12</sup> See also, *Calbeck v. Travellers Ins. Co.*, 370 U.S. 114, 127, footnote 15; *Automobile Club of Michigan v. Commissioner*, 353 U.S. 180, 183; *Association of Clerical Employees v. Brotherhood of R. & S.S. Clerks*, 85 F. 2d 152, 156 (C.A. 7).

provisions of the Communications Act are applicable (secs. 2(a) and 3(a), 47 U.S.C. 152(a) and 153(a)). We further conclude that our statutory powers, particularly under section 4(i), 303 (f), (g), (h) and (r) include authority to promulgate necessary and reasonable regulations to carry out the provisions of sections 1, 307(b), and 303(s) of the act and to prevent frustration of the regulatory scheme by CATV operations, whether or not microwave facilities are used. The rules proposed in part I and paragraph 50 of the notice are within our legal authority.

### *B. Assertion of Jurisdiction*

20. We turn now to the further question of whether jurisdiction over nonmicrowave CATV should be exercised at this time. Most of the comments in support of jurisdiction favored an immediate extension of the carriage and nonduplication requirements to nonmicrowave CATV systems, and the adoption of an interim policy either along the lines proposed in paragraph 50 of the notice or of broader scope. However, some of the supporting comments and many of the opposition comments took the position that we should not exercise jurisdiction, even if present, until Congress has legislated on the subject. It is urged that this would provide needed policy guidelines and avoid protracted litigation on the jurisdictional issue.

21. We stated in the notice (par. 31) that we would "welcome (i) a congressional guidance as to policy, and (ii) congressional clarification of our authority, which would lay the troublesome jurisdictional question at rest." In this report, we stress again the desirability of our view of congressional guidance in this important area. But the lack of congressional guidance or clarification has not been forthcoming; and in the present circumstances, our decision cannot properly turn on a desire to avoid litigation or on the hope of obtaining proper guidance in the CATV field. The Commission has not been "left high and large" as to the criterion to be following in performing our statutory duties in the dynamic communications field. *National Broadcasting Co. v. United States*, 319 U.S. 190, 219-220. The public interest touchstone provided by Congress afforded a sufficient standard for our decision to adopt the carriage and nonduplication requirements for microwave-served CATV systems in the first report and order on docket Nos. 14895 and 15233. Since the "considerations underlying our conclusion that this is necessary in the public interest to avoid unreasonable competitive disadvantage and prejudicial effect on existing and potential television broadcast service apply equally" to nonmicrowave CATV systems (notice, par. 27), there is likewise a sufficient standard for judgment here. Finally, our action with respect to the paragraph 50 proposal is similarly dictated by the "public interest in the larger and more effective use of radio" (sec. 303(g)).

22. Most of the comments agree that, apart from the basis for jurisdiction, there is no significant difference between microwave and nonmicrowave systems. However, National Community Television Association, Inc. (NCTA), asserts that there is no basis for assuming



they are alike. It points to no factual distinction. Rather, NCTA renews its contentions in dockets Nos. 14895 and 15233 that no adequate factfinding inquiry has been conducted, and claims further that adverse impact has not been established and cannot support an assertion of jurisdiction. In this connection, NCTA has appended to its comments the material it submitted before the House subcommittee hearings on H.R. 7715. It urges particularly that the 15 days before and after nonduplication period is unjustified, and has no reasonable relationship to the showing of nonnetwork programing. NCTA's staff has undertaken a study to test the validity of the Commission's sample week network study (first report, pars. 104-109), and has found that the data developed by the Commission supports its conclusion that delayed programing occurs most frequently among affiliates in the mountain time zone, and there in one- and two-station markets. NCTA claims that its study of 33 mountain time zone stations with CATV penetration shows no adverse consequences (NCTA comments, exhibit A). It points in addition to specific examples of small market stations which have allegedly increased circulation and maintained the same or a higher network hourly rate since 1960, despite substantial CATV penetration of their service areas (NCTA comments, exhibits A and B).

23. While the inferences NCTA draws from its studies are sharply criticized in the reply comments of Association of Maximum Service Telecasters (AMST), we do not think it necessary or useful to set forth the contentions of each or to discuss their dispute as to individual situations. The NCTA appendixes do not differentiate between microwave and nonmicrowave CATV systems; on their face they constitute an attack on the validity of the first report and order in dockets Nos. 14895 and 15233. But the supplementary material upon which NCTA now relies as indicating a lack of past impact is similar in nature to the showing there considered at length and would not in itself warrant reversal of our conclusions.<sup>13</sup> Indeed, NCTA, in relying upon its showing, simply ignores the two most important grounds of our decision, namely, (i) the fair competition ground, and (ii) the economic impact ground, *based on the CATV trend in recent years*. Since this is so, it may be well to restate those grounds briefly, and to take account of current information pertinent to those grounds.

24. In the first report and order in dockets Nos. 14895 and 15233, we concluded that CATV serves the public interest when it provides program choices not locally available off the air and acts as a supplement rather than a substitute for off-the-air television service, explaining our principal reasons as follows (par. 44):

\* \* \* Because of the prohibitive cost of extending the cables beyond heavily built-up areas, CATV systems cannot serve many persons reached by television broadcast signals. Persons unable to obtain CATV service, and those who cannot afford it or who are unwilling to pay, are entirely dependent upon local or nearby stations for their television service. The Commission's statutory obligation is to make television service available, so far as possible, to *all* people of the United States on a fair, efficient, and

<sup>13</sup> We have decided, for the reasons set forth in pars. 47-55 below, to delete the provision for nonduplication 15 days before and after the local broadcast and to substitute a requirement for nonduplication only on the same day as the local broadcast. Thus, our resolution of this matter affords NCTA substantially the relief it has requested.

equitable basis (secs. 1 and 307(b) of the Communications Act). This obligation is not met by primary reliance on a service which, technically cannot be made available to many people and which, practically, will not be available to many others. Nor would it be compatible with our responsibilities to permit persons willing and able to pay for additional service to obtain it at the expense of those dependent on the growth of television broadcast facilities for an adequate choice of services.

25. Our determination to adopt the carriage and nonduplication requirements rested on two basic grounds: (1) That failure to carry local stations and duplication of their programs are unfair competitive practices, which are inconsistent with the supplementary role of CATV (pars. 49-57, 76), and (2) that these requirements were necessary to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service both existing and potential (pars. 58-75, 77).

26. With respect to the first ground, we found that the CATV system which fails to carry the local station on its system has in practical effect cut off the station from access to CATV subscribers (par. 51). We stated (par. 57):

As a competitive practice, the failure or refusal by a CATV system to carry the signal of a local station is plainly inconsistent with our belief that CATV service should supplement, but not replace, off-the-air television service. The cable system that follows such a practice offers the subscriber the benefits of additional television service at the price of blocking or impeding his access to available off-the-air signals. \* \* \*

Because it is inconsistent with the concept of CATV as a supplementary service, because we consider it an unreasonable restriction upon the local station's ability to compete, and because it is patently destructive of the goals we seek in allocating television channels to different areas and communities, we believe that a CATV system's failure to carry the signal of a local station is inherently contrary to the public interest. Only if we were persuaded that the overall impact of CATV competition upon broadcasting would be entirely negligible would we consider countenancing such a practice.

27. We further pointed out that CATV, though distributing the programs of the television broadcast service, stands outside its normal program distribution process and fails to recognize the reasonable exclusivity for which the local stations have bargained in the program market when it duplicates local programming via the signals of distant stations (pars. 52-56). We summarized our conclusion that this was unfair and inconsistent with CATV's supplementary role as follows (par. 57):

In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition. We do not regard the patterns of exclusivity created in the existing system for the distribution of television programs as sacrosanct. We think it apparent, however, that the creation of a reasonable measure of exclusivity is an entirely appropriate and proper way for program suppliers to protect the value of their product and for stations to protect their investment in programs. We think the basic congressional judgment underlying section 325(a) limitation on re-broadcasting is the same.

Nor do we consider the duplication of existing off-the-air service to be consistent with CATV's appropriate role as a supplementary service. Whatever the ultimate impact of CATV competition upon the revenues and operation of competing stations, duplication is highly likely to affect the audience



for the specific programs involved. And it does so without generally offering the public a substantially different service. We believe that a service such as CATV, which lives on the product of the existing television service, should at a minimum give some measure of recognition to the fundamental distribution practices which have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries. Once again, unless we were convinced that the impact of CATV competition upon broadcasting service would be negligible, we would favor some restrictions upon the ability of CATV systems to duplicate the programs of local broadcasting systems, as a partial equalization of the conditions under which CATV and broadcasting service compete. [Footnotes omitted.]

28. We stated that the foregoing grounds were "enough to justify regulatory action" (par. 58) and that "every station affected is entitled to appropriate carriage and nonduplication benefits—irrespective of the specific damage which any individual CATV system may do to the financial health of the individual station" (par. 76). But, as stated, we also turned to another ground based on the economic impact of CATV upon television broadcast development. We considered at some length the data and arguments before us on the question of impact (pars. 58-75), finding—as in 1959—that it is "impossible, with the data at hand, to isolate reliably the effects of CATV competition from all of the other factors which operate to produce particular financial results in differing settings" (par. 68). However, taking account of nationwide trends affecting the nature of CATV offerings, the character of the markets entered, and the degree of penetration achieved, we also found it plain that CATV could have substantial negative effect upon station revenues and audiences even though we lack the tools to measure precisely the degree of impact (pars. 65-69). We further found reason to believe that the impact was likely to be "more serious in the future than it has been in the past" (par. 69), and stressed our concern with the effect of explosive CATV growth in a critical period for UHF development (pars. 71-77). In sum, the Commission's judgment on this ground was based very largely, not upon the past, but upon the trends which were already evident and whose dimensions called for action now to assure the public interest in the future.

29. The additional showing made in the appendixes to the NCTA comments is not directed to the above crucial considerations concerning the trends in the CATV or UHF fields. Instead, it focuses upon certain situations which, it claims, establish that CATV has no adverse impact upon television broadcasting. But each of its examples is sharply disputed by AMST, which points to significant impact in some cases or sets forth other factors for the improvement in the situation of the television station in the face of CATV competition. For example, AMST notes that several stations whose network hourly rate has not declined since 1960 were already at or near the minimum rate for the network involved (AMST reply comments, pp. 27-28, Attachment A, pp. 10-14). It attributes whatever success station WLUC-TV, Marquette, Mich., has enjoyed in recent years to new management beginning in 1960 and states that the station has suffered a decline in average quarterly hour audience while local revenues have

remained stagnant (AMST reply comments, pp. 29-30, attachment A, p. 14). AMST also points out that WBOC-TV, Salisbury, Md., following a change in ownership in 1961 and the infusion of a substantial financial investment, extended its hours of operation, improved its programming, and doubled its service area through substantial power increase. (AMST reply comments, pp. 31-attachment A, pp. 15-16.)

30. It would, we think, serve no useful purpose to delve into each of those situations. For even assuming that it were possible to isolate the significance of CATV in each situation from other factors, it was feasible in the *Carter Mountain* case, first report, par. 64) it would not afford greater insight into the crucial aspect of the matter—the explosive growth and changing character of CATV and its possible impact upon television broadcasting in the future. And, as to that aspect, events since the issuance of the first report reinforce our judgment made by us upon the basis of the above-mentioned trends in the industry. For, as the comments in this proceeding show, without dispute in this respect, the trends described in paragraph 65 of the first report have become even more pronounced. We shall briefly review those trends in light of their importance to our judgment.

31. In the first report we relied on estimates in the Seiden report which were based on data compiled in 1964.<sup>11</sup> The Seiden report stated (p. 2) that there were approximately 1,300 CATV systems serving approximately 1.2 million TV homes. The reply comments of AMST, filed on September 17, 1965, contain the following estimates as of mid-1965 (AMST reply comments, attachment A, prepared by Economic Associates, Inc., of Washington, D.C., using data from *Television Factbook* (No. 35) and *Television Digest*):

Communities with operating CATVs-----	1, 1
Communities with CATVs franchised (but not yet operating)-----	3
Communities with CATV applications pending-----	3

While these figures are not tendered as precisely accurate,<sup>15</sup> the rapidly accelerating rate of growth is confirmed in statistics given by licensees commenting on the situation within their service areas,<sup>16</sup> in the trade press, and in letters received by the Commission from local franchising authorities and other members of the public.

32. In addition, the channel capacity of CATV systems is increasing. According to the Seiden report (pp. 2, 54) the usual CATV system in 1964 delivered five signals and 85 percent of all systems delivered between three and seven signals. However, there is indication in the record that most of the new CATV systems have a channel capacity of 12 channels and many of the older systems are expanding their original capacity. The AMST reply comments (attachment A) contain the following table showing the cable capacity for the CATV systems for which it was able to obtain data:<sup>17</sup>

<sup>11</sup> This estimate was based on comments filed in dockets Nos. 14895 and 15233 and report submitted to us by Dr. Martin H. Seiden, entitled "An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry" (Government Printing Office, February 1965), hereafter referred to as the "Seiden report."

<sup>15</sup> There are other estimates (see par. 116, describing the *Television Digest* estimate), whatever the estimate, CATV growth is clearly explosive in nature.

<sup>16</sup> E.g., comments of Midwest Television, Inc.; West Central Broadcasting Co.; WFL Television, Inc.; Mobile Video Tapes, Inc.; and Bonneville International Corp.

<sup>17</sup> The data were compiled from reports in *Television Factbook* (No. 35), *Television Digest* questionnaires on file at the Commission, and ARB publications.

CATVs starting	Capacity, in number of channels (including FM) <sup>1</sup>											
	2	3	4	5	6	7	8	9	10	11	12	
1951.		3		28	2	1					13	
		3		26		1	1				15	
		3	1	36	1	4		2	1		10	
	1	5		39	3	3		2	1		20	
		5		43	2	2		4			11	
		3	1	30				1			10	
	1			23		3	1		1		5	
		2		27	1		1		1		7	
			1	28			1	1			4	
		2		26		2	1	1			6	
				21		1			1		9	
	1			25				1			16	
				21	1	1	1				34	
				15	1	2		9		3	53	
July 1965				5		1	2	1			44	
Totals	3	26	3	393	11	21	10	22	5	3	256	

<sup>1</sup>Includes expansions subsequent to starting date. Limitations of the source data make it impossible to determine the original capacity of most of these systems.

expanding channel capacity is also reflected in the answers submitted to our questionnaire sent to all known CATV systems in connection with the transition period question. (See pars. 103-107, within.) It further appears that CATV activity is accelerating in areas where there is the greatest interest in UHF development. The comments of AMST list all communities or metropolitan areas where UHF stations were operating, authorized, or applied for as of July 8, 1965, and indicate the extent of colocated CATV activity (AMST comments, attachment C, table 2).<sup>18</sup> The results are summarized by AMST as follows (comments, p. 59):

There are 237 UHF stations and 93 educational stations either operating or with outstanding construction permits or for which applications are pending in communities or metropolitan areas with a total population of over 112 million. The cities and metropolitan areas with CATV systems operating, pending, or applied for account for at least 85 million people. At least 145 communities or standard metropolitan areas with UHF stations operating, authorized, or applied for also have CATV activity. In 68 such communities or metropolitan areas where there are already operating CATV systems; at least 67 have CATV systems franchised but not operating, and at least 93 have CATV applications proposed.

The situation in central Illinois is described by Midwest Television, Inc. (Midwest), licensee of UHF station WCIA, Champaign, Ill.; UHF station WMBC-TV, Peoria, Ill.; and applicant for a new UHF station in Springfield, Ill.<sup>19</sup> Midwest states that CATV is in process of growth in virtually all of the major communities served by WCIA, including Champaign and Urbana themselves.<sup>20</sup> Franchise applications have been filed or proposed in at least 12 communities in the WCIA grade B service area, and CATV systems are operating under construction, or franchised in some 15 more. These 27 communities have a total population of 464,500—nearly one-half of

<sup>18</sup>According to AMST, table 2 is limited to the central communities or metropolitan areas where there is UHF activity, and does not include CATV activity elsewhere within the service area of a station located in the community or metropolitan area.

<sup>19</sup>Midwest is also the licensee of KFMB, San Diego, Calif.

<sup>20</sup>Champaign has one UHF and one UHF station, and is also the location of a UHF station and a Decatur UHF station.



the total population within WCIA's grade B service area. With the grade B service areas of WMBD-TV, Peoria, and of W71AE, Midwest's La Salle translator, CATV is at various stages—from franchise proposals to actual operation—in at least five communities, including Peoria itself (which has three operating UHF stations and a variety of UHF commercial assignment). The total urban population of the five communities is 221,294—between one-third and one-half of the total population in the grade B service areas of WMBD-TV and La Salle translator. In Springfield (which has one operating UHF station and applications pending for two new UHF stations), applications for CATV franchises are under active consideration in Springfield and another community located in the grade B contour of the proposed UHF stations. The total urban population of the cities is 92,072—approximately one-half of the total population within the grade B contour of Midwest's proposed new UHF station. Midwest states that the proposals for CATV in Springfield, Peoria, Champaign, and Urbana have all been announced since April 23, 1965, and that at least eight new CATV operators filed applications for franchises in central Illinois during the first 2 weeks of July.

35. A description of CATV growth in the Rio Grande Valley, Texas is given by Mobile Video Tapes, Inc., the licensee of KRGV-TV in Weslaco-Harlingen, Tex. According to Mobile Video Tapes, Weslaco has a 1960 census population of 15,649 and the population of Harlingen-San Benito urbanized area is 61,658. It states that the Walter Thompson Co. (*Population and Its Distribution, The United States Markets*, 8th ed., 1961), lists the Brownsville-Harlingen-San Benito market (which includes Weslaco) as a class "C" market, 143d market in the United States, with a population of only 151,143. The ARB total net weekly circulation of KRGV, as of March 1, 1965, was only 75,100 homes. CATV franchises have been granted in towns within its service area and other CATV systems are proposed. The communities with CATV franchises, their populations, and the grade of KRGV coverage are given by Mobile Video Tapes as follows:

Community	1960 census population	KRGV coverage
Brownsville	48,040	Grade A.
Edinburg	18,706	City Grade
McAllen	32,728	Grade A.
Mission	14,081	Grade B.
Pharr	14,106	City Grade

Mobile Video Tapes points out that this "constitutes the heart of the market—84.4 percent of the population shown by J. Walter Thompson for the entire Brownsville-Harlingen-San Benito market."

36. It appears, moreover, that there is significant CATV activity in the vicinity of fairly large cities with multiple channel assignments. The AMST comments (attachment C, tables IA, B, and C)<sup>21</sup> tabulate the CATV systems in operation, franchised or applied for within

<sup>21</sup> Corrections to these tables were supplied in an "addendum" to the AMST comments submitted on Aug. 12, 1965.

the A and B contours of existing or potential VHF and UHF stations in 11 areas "believed to be centers of considerable CATV activity": Bakersfield and Sacramento, Calif.; Orlando and St. Petersburg, Fla.; Rockford, Ill.; Evansville and Indianapolis, Ind.; Wester and Utica, N.Y.; and Columbus and Dayton, Ohio. The extent of CATV penetration is detailed in tables IA, B, and C. All three show separate figures for grade A and grade B contours, for VHF and UHF respectively. Table IA shows the penetration in terms of number of places in which CATV franchises have been granted or applied for. Table IB gives the equivalent data in terms of potential CATV households<sup>22</sup> compared with the total number of households within the broadcast contours. Table IC converts the data in IB to percentages of the total number of households within the broadcast contours.

The analysis shows that in these 11 areas there are approximately 230 places in which a CATV system was operating, franchised, or proposed (as of July 8, 1965) within the grade B contours of existing or potential VHF and UHF stations located in the central community of each of the 11 markets. These 230 places contain nearly 1,900,000 households. In Bakersfield, Calif., an all UHF market, almost two-thirds of the potential UHF audience is already franchised to CATV systems. In Utica, N.Y., the figure is 44 percent. If already submitted or proposed applications result in franchises, a UHF station in Columbus, Ohio, would have CATVs potentially competing for 60 percent of its market and a VHF station for more than half. Existing and pending CATVs in the Indianapolis area involve half the VHF market and about three-fifths of the UHF market. In Sacramento, CATV potential comes to over 40 percent of the UHF market and nearly half the VHF.

There is also widespread CATV activity within major cities. Attention has been called to the asserted intent of CATV interests to "take up" "almost all American cities—small and large" and 85 percent of all television sets—40 million homes.<sup>23</sup> The December 1965 issue of *Television Magazine* (vol. 22, No. 12) states that franchise applications have been filed in San Francisco, Seattle, Pittsburgh, Baltimore, Fresno, Columbus, Tucson, Birmingham, Providence, and Sacramento. Two of the commenting parties in this proceeding are applicants for CATV franchises in Philadelphia. The comments of Columbia Broadcasting System (CBS) refer to applications for CATV franchises in Albany and Syracuse, N.Y.; Galveston, Tex.; and grant of a CATV franchise in Wilmington, Del. D. H. Overmyer, committee of new UHF station WDHO-TV in Toledo, Ohio, comments that local authorities have granted a CATV franchise for that city since the issuance of the joint notice herein. Toledo has two VHF stations, a UHF educational station, and—according to Storer Broadcasting Co., receives the signals of four Detroit-Windsor VHF stations, over the air and without reception difficulty. Telerama, Inc., an applicant for a CATV franchise in Cleveland, has filed comments describing

<sup>22</sup> The tables use potential, rather than actual audience, i.e., the total number of households within the broadcast contour, and the total number of households in the community of the CATV.

<sup>23</sup> Address by Milton J. Schapp, "CATV—Past, Present, Future," Dec. 8, 1964, reprinted in *Television Digest* special supplement, vol. 4, No. 50, Dec. 14, 1964, p. 1.



its proposed cable operation for that city which has three VHF stations, a UHF educational station, and applications pending for new UHF facilities.<sup>24</sup> Taft Broadcasting Co., in a June 1965 petition to deny a microwave application (file No. 6226-C1-P-65) to bring three New York independent stations to CATV systems in the Wilkes-Barre-Scranton area of Pennsylvania, states that in the last 6 months 90 franchise applications have been filed in 54 communities in Luzerne and Lycoming Counties. The Scranton-Wilkes-Barre area is served by three UHF stations, providing three full network service.

39. The most factually detailed comments on big city CATV were submitted by Midwest Television, Inc., licensee of station KFMB-TV in San Diego, Calif. According to Midwest, CATV is growing at a great speed in the San Diego area, which is presently served by three VHF stations providing the programs of all three networks.<sup>25</sup> In addition, construction permits are outstanding for two new commercial UHF stations in San Diego and an application is pending for a UHF educational station. Since March 1963, when the first CATV system in the area was franchised, seven additional systems have been franchised. All eight CATV systems are within the broadcast contour of KFMB-TV, which falls within the Metropolitan San Diego area; four are located in San Diego itself. While four of the eight systems are not yet operative, two of these are expected to begin operations momentarily. The operating CATV systems, which do not use microwave, carry the signals of all seven Los Angeles commercial VHF stations and carry the local stations without affording duplication protection. Midwest has been unable to obtain the current subscriber count, estimated at approximately 10,000 homes in February 1965.<sup>26</sup> However, its engineering personnel recently counted drops in a part of San Diego where CATV had been available for only 3 months. Of the 159 homes in that area, 58 were wired for CATV—and this, Midwest points out, “is an area where all the stations can be satisfactorily received” (Midwest comments, p. 24).

40. The Midwest comments also describe what it considers to be the effect CATV operations of this nature have on the audience of the local network-affiliated stations. Southwest Surveys, an independent research organization, conducted a survey for Midwest in June 1965, interviewing 300 CATV subscribers and 300 nonsubscribers in the San Diego area. Forty-three percent of the CATV subscribers had been subscribers for less than 3 months. Midwest states (comments, p. 1) that during the prime evening hours of 7:30 p.m. to 11 p.m., when most of the programs broadcast by the three San Diego area stations were network programs, the San Diego area stations accounted for 38

<sup>24</sup> Telerama plans to carry all local stations and two Canadian stations on a full-time basis and to carry on a part-time basis on the remaining channels the signals of network-affiliated stations in Detroit, Toledo, Erie (Pa.), and Youngstown and Akron, Ohio. While it does not propose to acquire microwave facilities to bring in Chicago and New York independent stations, Telerama states that if these signals are made available to the Cleveland area by common carrier facilities, “then Telerama may avail itself of the access to such signals.” Since Telerama submitted its comments, Cleveland has granted a franchise to Telerama.

<sup>25</sup> Midwest's station KFMB-TV is a CBS affiliate, KOGO (San Diego) is an NBC affiliate, and the third station, XETV (located in Tijuana, Mexico, just a few miles from San Diego), is an ABC affiliate.

<sup>26</sup> San Diego Telecasters, Inc., permittee of UHF station KAAR-TV in San Diego, estimated as of Aug. 25, 1965, that there are “more than 15,000 sets now served by cable.”

97 percent of the total viewing time of non-CATV subscribers interviewed in two different areas and only 62 percent among cable subscribers. During the hour from 9 p.m. to 10 p.m., Sunday through Wednesday, when each program broadcast by each of the San Diego stations was simultaneously duplicated on CATV by Los Angeles stations, 93 percent of the nonsubscribers saw them on local stations whereas only 77 percent of the cable subscribers did so (pp. 9-10). Of the cable subscribers, 49 percent reported that they viewed a San Diego channel most; 55 percent named a Los Angeles channel. Of the nonsubscribers in two separate areas, San Diego stations were viewed by 108 and 94 percent, respectively, while Los Angeles stations were named by only 5 and 11 percent (*id.*, p. 25).<sup>27</sup>

1. With respect to nonnetwork viewers, Midwest states that 25 percent of the CATV subscribers named a Los Angeles independent station as the channel they viewed most and only 1 and 2 percent, respectively, of the two groups of nonsubscribers did so. More than 60 percent of the CATV subscribers (as compared to 11 percent of the nonsubscribers) named at least one Los Angeles independent as one of the three stations most viewed (*id.*, p. 26). During the period 5 p.m. to 6 p.m., Monday through Friday, there was no duplication of any Los Angeles station of programs broadcast in San Diego and each cable subscriber could watch any one of 10 different programs. Among nonsubscribers interviewed, 95 percent of those who watched television during that hour watched one of the San Diego stations. Among cable subscribers the Los Angeles stations accounted for 52 percent and the San Diego stations 48 percent (*id.*, pp. 26-27).

2. Moreover, appended to the comments of Columbia Broadcasting System (CBS), which is opposed to an assertion of jurisdiction, is a further study of CATV prepared by its office of economic analysis. The CBS study points out that there is a timespan lag before CATV impact is felt (CBS comments, exhibit A, p. 27). This is partly because CATV penetration does not occur all at once; growth is gradual. But CBS also states that networks react slowly to changes in station audiences and that it might take 3 to 5 years for a change in an affiliate's audience to be reflected fully in the relative network rate, national spot revenues and local advertising, while reacting more quickly, would still take a considerable time. The study concludes (p. 31) that the "true reasons for the modest impact of CATV thus far are the relatively small amount of penetration that CATVs generally have in any particular market and the considerable length of time necessary for the effects of CATV to work themselves out."<sup>28</sup>

3. Like the Seiden report, the CBS study bases its discussion of CATV potential and impact on CATV systems operating or franchised as of August 1964. It concludes, therefore, that CATV potential is limited to communities more than 40 miles from three stations providing the service of the three networks (plus some metropolitan

<sup>27</sup> Percentages total more than 100 percent because some multiple answers were given. "AMST" argues that this timelag is not as great as CBS asserts. It states, *reply comments*, p. 22: "However long before an affiliate's network rate card is affected, advertisers will inevitably drop from network orders those stations which show serious audience losses, whether from CATV or any other cause. That this is the likely sequence is demonstrated by the parallel situation—network radio, which felt the impact of television by a drop in station orders long before those stations' network rates were affected."

area apartment-house dwellers), an estimated 6-8 million TV households. However, the study recognizes (p. 14) that CATV "systems are clearly moving closer to transmitting points" and states further (pp. 16-17):

There is a final caveat that must be made at this point. There has been in the very recent past, and not included in the systems in our study, a group of applications for CATV systems in communities with three or more than adequate network services which do not appear to be related to apartment-house reception problems. Thus, applications for franchises have been made in places like Albany, Syracuse, Galveston, Philadelphia and Cleveland, and a franchise has just been granted in Wilmington, Del. While these do provide alternative programming, we do not know a yet whether this added factor will be sufficient to make the systems viable. If these systems are established and thrive, it is clear that the potential for community antenna systems far exceeds anything that we have tried about thus far and, in fact, much of the country could ultimately become CATV territory."

44. In view of the rapidly changing circumstances outlined above, we can see no point in conducting a further factfinding inquiry with respect to nonmicrowave CATV as it has existed in the past. The extensive studies conducted by Dr. Fisher, Dr. Seiden, and NCT, in conjunction with dockets Nos. 14895 and 15233,<sup>29</sup> and further studies of CBS and AMST in this proceeding, all concerned nonmicrowave as well as microwave CATV systems. Studies of this nature are out of date almost before we have had time to consider them. Moreover, they are of limited value since they cannot measure some of the most important factors we are bound to consider. These include the cumulative future effect of greater penetration by CATV systems franchised or applied for but not yet in operation, the degree of success to be achieved by CATV systems in big cities or other well-served areas, and the effect of the burgeoning CATV activity—if left unregulated—on the decisions of potential applicants and existing licensees as to whether to inaugurate or improve service.<sup>30</sup>

45. What we said in the first report and order in rejecting NCT's argument that regulatory action should not be taken in the absence of a showing that stations have ceased operation, or are about to cease operation, applies with equal force to its renewal of that argument here.<sup>31</sup> We stated (par. 77):

<sup>29</sup> See, e.g., pars. 20 and 32 of the first report and order in dockets Nos. 14895 and 15233, and p. 49 of the Seiden report.

<sup>30</sup> The CBS study further asserts (pp. 27-30) that the effects of a rise in CATV penetration with its depressing effect on station revenues are offset in large degree by the consistent rise in advertising demand for television time. However, as AMST points out, the number of stations sharing the advertising demand is also increasing as new UHF stations stimulated by the all-channel law commence operations. Moreover, annual broadcast expenses are on the average increasing apace with revenues.

<sup>31</sup> While the distant signal procedure adopted in pt. II will probably have some effect on the trends we have been here discussing, we think that application of the carriage and nonduplication requirements to all systems is still required in the public interest. First, not only will this end the present unwarranted discrimination between the microwave and nonmicrowave system, but it is called for on the basis of the fair competition ground, discussed in pars. 26-27. Second, as to the economic impact ground we note that in view of recent growth, there are a very substantial number of CATV systems operating on the date of release of this report with the capacity to keep growing to perhaps 50-70 percent of the television homes in their communities, and thus to have a cumulative effect in a community such as those noted in the prior discussion (e.g., pars. 35-37). New systems will continue to come into operation under the interim procedure, and it may be important that a cumulative effect of such systems, after growth to significant figures, be ameliorated to some extent by the carriage and nonduplication requirement. Most important, the distant-signal procedure is of interim nature, subject to discontinuation or revision. See par. 150. The carriage and nonduplication rules which we adopt here are not interim—they are our best judgment of what the public interest calls for over an indefinite period.



NCTA's argument that CATV has not yet caused any widespread demise of existing stations misses the point. As we have pointed out above, it would be clearly contrary to the public interest to defer action until a serious loss of existing and potential service had already occurred, or until existing service had been significantly impaired. Corrective action after the damage has already been done, if not too late, is certainly much more difficult. Further, it is difficult, if not impossible, to attempt to delineate with any precision a factor such as discouragement of entry of potential broadcasters because of CATV competition. In short, we must plan now for the healthy coexistence of CATV and local stations and safeguard the public from future injury. Circumstances have changed since our 1959 report and order, and the likelihood or probability of adverse impact upon potential and existing service has become too substantial to be dismissed. If studies are in conflict and present a close question as to the precise extent of the impact, it is not close as to how this uncertainty should be resolved. This is one of those situations in which the public interest requires that conditions conducive to the sound future of television "be assured rather than left uncertain." *United States v. Detroit Navigation Co.*, 326 U.S. 236, 241. This is particularly so, where we have two modes of service, one of which is almost completely dependent on the other for its product. In such circumstances, uncertainties should be resolved in favor of insuring the healthy growth and maintenance of the basic service.

6. In sum, we have concluded in the first report and order in Dockets Nos. 14895 and 15233 that the public interest requires that CATV systems carry local stations without duplication for a reasonable period, in order to avoid unfair competitive disadvantage to and prejudicial effect on existing and potential broadcast service. We have concluded herein that we have authority under the present provisions of the Communications Act to extend these requirements to non-microwave systems. In view of the rapid surge in CATV growth since this proceeding was initiated, we think that our statutory obligations require us to act now in the areas we have proposed. This ends the present unwarranted distinction between microwave and non-microwave systems, and will enable us to make the rules effective when operations are commenced by a large number of CATV proposals presently in the franchise or application stage.

### *C. Substantive Provisions of the Rules*

7. CATV systems, as we recognized in the first report (pars. 43, 48 and here again emphasize, have arisen in response to public need and demand for improved television service and perform valuable public services in this respect. CATV (like other auxiliary television services) makes possible the provision of a variety of program services, particularly the three full network services, to many persons in areas with no local station and in one- and two-station markets. CATV systems also afford a means of providing nonnet work commercial and educational services to many persons in areas with insufficient population to support local broadcast outlets of this nature. CATV systems make important contributions by providing good quality reception of color signals and improving reception of local signals in areas within the predicted contours of local stations where off-the-air reception is inferior or precluded because of terrain, manmade structures, or other factors. We do not intend to deprive the public of these important benefits or to restrict the enriched programming selec-

tion which CATV makes available. Rather, our goal here is to integrate the CATV service into the national television structure in such a way as to promote maximum television service to all people of the United States (secs. 1 and 303(g) of the act), both those who are cable viewers and those dependent on off-the-air service. The new rules discussed below are the minimum measures we believe to be essential to insure that CATV continues to perform its valuable supplementary role without unduly damaging or impeding the growth of television broadcast service.

48. To insure effective integration of CATV within a fully developed television service, the new regulations will apply equally to all CATV systems, including those which require microwave licenses and those which receive their signals off the air.<sup>32</sup> We have carefully reexamined the CATV rules currently in effect for microwave-fed systems, and have made some changes. The microwave rules will be revised to reflect the new rules adopted for all systems.

49. In brief, under the new rules, a CATV system will be required, upon request and within the limits of its channel capacity, to carry without material degradation the signals of all local television stations within whose grade B contours the CATV system is located in order of priority of signal grade. A CATV system will be required, upon request, to avoid duplication of the programs of local television stations carried on the system during the same day that such programs are broadcast by the local stations. This nonduplication protection, as under the existing rules, will apply to "prime time" network programs (i.e., presented by the network between 6 and 11 p.m., eastern time) only if such programs are presented by the local station entirely within what is locally considered to be "prime time." Nonduplication protection will not be afforded to programs which are carried in black and white by the local station and are available in color from a more distant station on the CATV system. Ad hoc consideration will be given to petitions from local television stations seeking a greater degree of protection than provided by the rules, or from CATV operators seeking a waiver of the rules, and the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules.<sup>33</sup>

50. Thus, the carriage requirements made applicable to all CATV systems will be substantially the same as those applied to microwave-served systems by the Commission's first report, except in certain minor respects discussed in paragraphs 74 and 83 below. However, the new nonduplication rules embody two substantial changes from those adopted in the first report. First, the time period during which nonduplication protection must be afforded has been reduced from 15 days before and after local broadcast to the single day of the local broadcast. Second, a new exemption from the nonduplication require-

<sup>32</sup> Excluded from these rules will be those CATV systems which serve less than 50 subscribers, or which serve only as an apartment house master antenna.

<sup>33</sup> Private agreements will not avoid the necessity for evidentiary hearing for the transportation of distant signals into the top 100 markets (pt. II, below), though such agreements will be considered in our decision.



net has been added as to color programs not carried in color by local stations. We shall discuss the nonduplication changes first because they are of a major nature.

#### *The nonduplication provisions*

1. *Modification of the nonduplication period.*—Nonduplication at the same time that a local broadcast is being carried on the cable is hereby called for in the public interest for the reasons discussed above in the first report. Simultaneous nonduplication protects the content of the popular network programming of most network affiliates and does not affect the time that such programming is available to the CATV subscriber. In the first report we further determined that this measure of protection beyond simultaneous nonduplication would also serve the public interest on a number of grounds. We did not repeat here the reasons set forth in the first report for that determination or for the further judgment that a 15-day before-and-after period was appropriate.

2. We have reconsidered the latter judgment and have decided to strike a different balance in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public. The systems which will now operate under the rules for the first time constitute the great bulk of the CATV industry. In addition to all non-microwave systems, they include a sizable number of microwave CATVs served pursuant to authorizations granted prior to December 1, 1963 when the interim condition procedure began. We recognize that the imposition of a 15-day before-and-after nonduplication requirement on systems which have not previously operated in this manner would tend to substantially disrupt the viewing habits of the CATV subscribers. As NCTA points out (NCTA comments, exhibit 1, pp. 35-38), there is no question but that large numbers of CATV subscribers have become accustomed to viewing network programs at the time they are presented by the distant affiliates. Although 15-day before-and-after nonduplication was not required where timeliness was important, and all distant city programs deleted under the rules would have been available to the CATV subscriber via the local signal at some time within the total 30-day period, the CATV viewer might not be able to view it on the later date of presentation by the local station for any number of personal reasons.

3. We believe it desirable to avoid disruption to the established viewing habits of the public as much as possible. Moreover, we are seeking to preserve, to the extent practicable, the valuable public contribution of CATV in providing wider access to nationwide programming and a wider selection of programs on any particular day. Balancing all the pertinent considerations, we think that the nonduplication period should be reduced to the same day for existing systems. Not only will this eliminate the great bulk of delayed nonduplication contests (see par. 125, first report), but it will insure that the program is available to the CATV audience that same day and, in the case of network prime-time programs, that same evening. While wholly eliminating any possible change in viewing time on the pertinent day, this revision clearly minimizes any disruptive effect on

the CATV viewer. As an incidental benefit, we note that same-day nonduplication will substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules, and this extent will facilitate ease of administration.

54. Application of a 15-day before-and-after nonduplication provision to new systems would not, of course, cause a similar disruption to established viewing habits, since the CATV subscriber would at the beginning receive service in accordance with the rules. It would be possible to "grandfather" existing systems on a same-day nonduplication basis and make 15-day nonduplication effective only on to new systems. But there are a number of countervailing arguments. First, even in the case of the new system, there is disruptive effect to the extent that the CATV subscriber may not be able to view programs from distant stations at the times specified in his TV guide (and may be unable to view them at the later date presented by the local station for any number of reasons). It is our understanding that it is essentially for that reason that some broadcasters, although previously entitled under our microwave rules to 15-day before-and-after nonduplication protection, have requested only simultaneous nonduplication. Second, it is obviously preferable to have one set of rules for all systems and thus to avoid the anomalous situation of millions of CATV subscribers viewing under one set of rules while other millions, often neighbors in close-by communities, are subjected to a different set. Under the circumstances, we think it better to proceed by rule for same-day nonduplication for all systems, and to safeguard the public interest in the particular instance warranting different treatment pursuant to the ad hoc procedures discussed in paragraph 97 below.

55. We also considered the question of retaining the 15-day before-and-after nonduplication provision for nonnetwork programming. But, as we have previously recognized, and indeed stress in our report (pars. 123, 131, *infra*), 15-day before-and-after nonduplication affords, at best, only minimal protection with respect to the presentation by local stations of syndicated and film programming. Such programming is not presented on a nationwide simultaneous or even near-simultaneous basis. Retention of the 15-day provision for nonnetwork programs alone would serve little effective purpose. Still differently, the adoption of a uniform "same day" rule will not, in our judgment, significantly affect the protection afforded as to nonnetwork or independent programming. Rather, we have determined that we must look elsewhere if we are to achieve effective relief in this respect. We treat the situation of the independent station in part II below. As a general approach encompassing all stations, we are proposing to the Congress that it consider the question of extending the rebroadcast concept of section 325(a) to CATV. It may be that regulation of this nature would prove a preferable and more effective means of achieving fair recognition of the exclusivity contracts of the program marketplace. Here again, we shall consider requests seeking more extensive protection of nonnetwork programming on an ad hoc basis.

<sup>2</sup> With "same day" nonduplication affording substantial protection to the most popular network programming, most network affiliated stations should be viable.

sure that the public interest is not prejudiced in the unusual situation although, as stated, we are unaware of any instance where the 15-day period afforded effective relief in this respect).

3. While conflicting considerations are presented, we believe that the resolution constitutes a fair compromise. First, same-day nonduplication is clearly sufficient to take care of the time zone differential problem, i.e., to preclude a CATV system, which brings programs across either border of the mountain time zone, from duplicating most, if not all, of a local station's network programs an hour or two before or after they are presented locally. Moreover, it will afford a station affiliated with more than one network some leeway in presenting what it regards as the most attractive programs of each for the benefit of the non-CATV audience (and also, the CATV audience—see par. 115, first report) so long as such programs are presented on the same day as the network presentation and prime-time programs are broadcast entirely within prime-time hours.<sup>54</sup> This, as stated, minimize any disruption to the CATV subscribers. In addition, we will consider requests by local stations and CATV systems for different treatment on an ad hoc basis, pursuant to the summary procedures discussed in paragraph 97, where possible, or by summary hearing if necessary. Thus, the station which receives its network programming by mail, or the station or system which faces some other unusual problem, can bring its situation to our attention for such relief as may be appropriate in the individual circumstances warranted by the public interest. Similarly, the CATV system may seek a waiver of the rules. We stress, in addition, that the Commission will continue to give full effect to private agreements between CATV operators and local television stations which provide for a different type or degree of protection for the local station than do the Commission's rules. We believe that the above resolution fairly serves the public interest. If further revisions are needed on the basis of our experience with these new provisions, we shall of course move promptly to implement such revisions.

7. Our decision to adopt same-day nonduplication makes appropriate some other revisions in the exclusivity sections of the rules. First, however, we stress those provisions which remain unchanged. CATV shall retain the provision requiring the local station to present prime-time network programming entirely within prime-time hours in order to be entitled to nonduplication.<sup>55</sup> Thus, the CATV system

<sup>54</sup> In this connection, we note that the amount of delayed network broadcasting in the one- or two-station markets is about 5½ and 11 hours per week, respectively. See par. 108, first report. While this amount is not insignificant and we recognize that there is some detriment to the public if the local station in the median market curtails delayed broadcasts because of the absence of nonduplication protection, we point out that the amount of delayed broadcasts is not of too large a nature in the median market, and that we should not expect the local station to cease all delayed broadcasts in the absence of delayed nonduplication protection. Moreover, the pending liberalization of our translator rules may result in greater availability of off-the-air service in one- and two-station markets.

<sup>55</sup> AMST has requested elimination of the exception for prime time programs broadcast outside of prime time hours. AMST urges that this provision is unnecessary because it is really in the best interests of the station to carry prime time programs in prime hours. The Commission has ample power to remedy any abuse. It is further asserted that there may be instances where a station reasonably desires, and has network consent, to carry such programs at other hours. However, a prior CATV presentation does not prevent the station from repeating the program outside of prime time if it has good reason to do so, and it is unlikely that instances of this nature would arise often enough to make the loss of exclusivity a significant problem. Since the provision is designed to insure that CATV subscribers have prime-time programs conveniently available in the hours of maximum viewing, the public interest is best served by its retention.



need not delete reception of any network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, which is broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for the network programming in the time zone involved. This will insure that such programs are available to the CATV subscribers in maximum viewing hours. We shall also retain the provision that the CATV system need not delete reception of any program at which time of presentation is of special significance, such as a sports or sporting event, except where the program is being simultaneously broadcast by the local station. And, although it is of greatly reduced significance for same-day nonduplication, we shall retain the provision that the CATV system need not delete reception of a network program if, in so doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by any stations whose signals are being carried and whose program exclusively is being protected pursuant to the requirements of the rules).

58. However, there no longer appears to be any real necessity for the provisos to sections 21.712(g), 74.1033(e), and 91.559(e), i.e., that:

(1) The system is not required to maintain the exclusivity of the network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which substantially duplicates the network programming of the station requesting exclusivity; and

(2) The system is not required to maintain the exclusivity of the network programming of any such station if the system carries the signal(s) of one or more equal or higher priority stations (other than a satellite or parent of the station requesting exclusivity) which operates in what is normally and usually considered other markets for purposes of television program distribution.

These provisions were grounded in the 15-day before-and-after nonduplication period which protected network programs delayed substantially beyond the date of network presentation and protected nonnetwork programs for a total of 30 days. In view of same-day nonduplication, we shall provide simply that higher priority signals carried on the system are entitled to exclusivity against lower priority or more distant signals but not against signals of equal priority.<sup>37</sup>

59. *Color duplication.*—In the first report and order in dockets Nos. 14895 and 15233 we decided that the public interest would be served by some accommodation which would permit a CATV system to duplicate the programs of a local station in color where the station transmits only in black and white (par. 143). However, we did not then determine whether such an exception should apply across the board or whether the CATV system should be required to make a threshold showing that a certain number or percentage of its subscribers possess color receiving sets. Comment on this question was invited in this proceeding.

60. Most of the comments, from broadcast and CATV interests alike, favor permitting color duplication on an across-the-board basis.

<sup>37</sup> Though these modifications stem from our action in shortening the nonduplication period, we note that changes of this nature were requested by AMST and ABC under the 15-day before-and-after nonduplication period.

One has supported the proposed alternative of requiring a threshold showing by the CATV system. It is urged that it is in the public interest for color programming to be available to as many persons as possible, and that this should be encouraged by the Commission pursuant to section 303(g) of the act. The few comments opposed to making an exception for color claim that it is unnecessary. They assert that most stations not already equipped to present network programs in color will acquire such equipment now that all of the networks have commenced a significant degree of color transmission. It is further asserted that the exception would penalize smaller stations lacking financial resources to convert to color.

1. In light of the comments, we have decided to permit color duplication of local black and white transmissions without requiring any threshold showing by the CATV system. It may be that most stations will shortly be equipped to present network programs in color. But in that event the broadcasters have no real cause for complaint in the adoption of a provision which will not adversely affect them. We think that the exception is in the direction of encouraging the wider distribution of color programming and that it is consistent with the supplementary role of CATV. Any local station finding itself at a significant disadvantage can install equipment for the transmission of network color programs "at relatively little expense" (comments of American Broadcasting Co.), which would benefit its non-CATV viewing public. Hardship situations may be brought to the Commission for such relief as may be warranted by the station's showing. Accordingly, the rules governing microwave served CATVs will be amended in this respect and the exception will be incorporated in the rules adopted for all systems. The exception will also apply where a local station is equipped for simultaneous color transmission of network programs, but delays a color program for later presentation on the same day by means of black and white video tapes.

2. Some of the CATV comments urge us to go further and permit duplication of local colorcasts where a CATV system makes a showing that the technical quality of the local signal is substantially inferior to another signal. While we would, of course, consider any such showing on a case-by-case basis, we have no reason to anticipate any widespread problem warranting action by rule. We expect that valid complaints of this nature will be rare. In most instances the technical quality of the local signal should be sufficiently good to permit satisfactory color reception on the cable if the CATV system and the station cooperate in good faith to accomplish this result. We would expect good-faith efforts by both to resolve any technical problem before any complaint is made to the Commission.

3. *Other changes in the nonduplication provisions suggested by the parties.*—The comments of NCTA (exhibit B, pp. 35-38) assert that last minute program changes by the local station require the CATV operator to bear the labor costs of a manually controlled switching device or to punch a new tape for the remainder of the week where an automatic switch is used. While this assertion was made in the context of the delayed nonduplication provision, we think that the broadcaster should afford the CATV sufficient advance notice of non-



duplication requests to permit the CATV system to make its program schedule available to subscribers and to set an automatic switch device only once for the entire week. Accordingly, we shall amend section 21.712(h), 74.1033(f), and 91.559(f) to require that the station, upon request of the CATV operator, shall give notice under sections at least 8 days prior to the broadcast to be deleted. Since same-day nonduplication affects principally network programs, which are ordinarily presented at the same time each week during the work season, this amendment should pose no difficulty for the station. Indeed, in most instances it would appear that such notice could be given at the start of the network season and continued in effect until further notice occasioned by changes in the schedule of the network or the local station.

64. AMST urges that the rules be modified to provide nonduplication protection to local stations which are not carried on the cable either because no request has been made or because of the limited channel capacity of the system. It states that carriage has no essential relationship to nonduplication and should not be a condition of the latter. We cannot agree. If nonduplication were afforded where the local station is not carried, the CATV subscriber would, in some instances, be greatly inconvenienced and, much more important, others be deprived of all opportunity to view the programs involved. See paragraph 51, first report. This is not the purpose or effect of the rules as written, nor would it serve the public interest. As set forth in paragraph 68 below, the better procedure where the system's channel capacity is too limited to permit full carriage of the local station is to substitute its programs for the duplicating outside signals. Partial carriage would retain the availability of the programs to CATV subscribers and at the same time afford the station some measure of protection.

65. Other changes in the nonduplication provisions requested by AMST and ABC have been rendered moot by our action in shortening the nonduplication period to 1 day and the modifications we have made in that connection. Accordingly, we shall not discuss their comments in this respect. The comments with respect to nonduplication of noncommercial educational stations are discussed in a separate section on educational television (sec. 4 below).

## 2. The carriage provisions

66. We shall, as stated, apply to all CATV systems substantially the same carriage requirements as were adopted for microwave-serried systems in the first report.<sup>39</sup> Thus, within the limits of its channel capacity, a CATV system will be required to carry the signals of all commercial and educational television stations within whose grade 3 contour the system is located, giving priority: First, to principal community signals; second, to grade A signals; and third, to grade B signals. The CATV system need not carry the signal of any station

<sup>39</sup> It has come to our attention that the requesting station may have difficulty in giving notice where the CATV does not always carry the same signals. Where a CATV system varies the signals it carries, it should provide the local stations with a copy of the CATV schedule plus sufficient time to permit the station to give notice of the programs to be deleted. There are, however, changes stemming from our resolution of the translator question (see 3 below).

(1) that station's network programming is substantially duplicated by one or more stations of higher priority, and (2) carrying it would, because of limited channel capacity, prevent the system from carrying a signal of an independent commercial station or a noncommercial educational station. Moreover, in cases where (1) there are two or more signals of equal priority which substantially duplicate each other, or (2) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations. Where a signal is required to be carried, it shall be carried without material degradation in quality, and shall be carried in its entirety except to the extent that nonduplication of higher priority signals may be required under the rules. Upon request of the local station, a signal shall be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) and on no more than one channel. Where a system is not carrying the signal of a grade B or higher priority station, it shall offer and maintain for each subscriber a switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber indicates in writing that he does not desire this device.

7. *Modifications requested by the parties.* - Some of the parties have requested changes in these provisions. Thus, NCTA urges that CATV subscribers see no reason why out-of-State stations should be regarded as local. It asserts that CATV systems should have the option to carry more distant signals originating within the same State in preference to out-of-State stations placing a grade B signal over the community. We agree that there may well be instances where the programming of stations located within the State would be of greater interest than those of nearer, but out-of-State stations - e.g., coverage of political elections and other public affairs of statewide concern. We recognize also that there may be instances where out-of-State stations located in another State are of greater community interest than the geographically nearer out-of-State stations because of closer community ties with the third State. Considerations of this nature will be accorded substantial weight as a basis for waiver of the carriage provisions.

8. In this connection, we emphasize that we intend to make every effort, consistent with the public interest, to avoid disrupting existing service to the public in applying the carriage provisions of the rules to systems now in operation.<sup>10</sup> Where, because of limited channel capacity, a CATV system cannot carry all grade B signals without dropping a more distant signal now being carried, we shall entertain a request for waiver of the rules pursuant to the summary procedures discussed in paragraph 97 below and upon the basis of the showing specified in paragraphs 104, 106. In appropriate circumstances, waiver

<sup>10</sup> As in the case of our present policy with respect to microwave systems, carriage will not be required where a sufficient showing is made that a predicted signal is not in fact present in the community, or that a good signal is not obtainable because of technical deficiencies on the part of the station.

ers will be granted, which will permit the system to continue to carry the distant signal and to substitute the nearer signal only where simultaneous duplication would occur. Thus, upon such waivers the CATV viewers would continue to receive all programs to which they are accustomed, via the more distant signal when the programs are different and via the local signal when the programs are the same. New systems can commence operation with a channel capacity sufficient to carry both the local and the distant signals; indeed, most new systems now commence operation with 12-channel capacity.

69. Section 21.712(f)(2), section 74.1033(d)(2), and section 91.559(d)(2) presently provide that where a signal is required to be carried, it "shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation)." WJAC, Inc., and WKBH Television, Inc., urge that carriage on channels other than the station's own should be a matter for the station's choice. According to WJAC, a station should be entitled both to insist that its signal be carried on another channel, and to select the channel of a lower priority or of a local station. AMST claims, on the other hand, that carriage on channels other than the station's own is extremely important and should be mandatory unless CATV makes a compelling showing that this is not technically feasible without degradation. It states that the CATV should be required to take all reasonable steps to eliminate material degradation which may result from the CATV equipment used or inadequate installation.

70. Since sections 21.712(f)(1), 74.1033(d)(1), and 91.559(d)(1) already provide that the "signal shall be carried without material degradation in quality (within the limitations imposed by the technical state of the art)," we do not think that any change in subsection (2) is called for. The requirement for onchannel carriage is only operative upon request of the station licensee or permittee. If this results in material degradation, the station can request carriage on another channel. Moreover, if the channel capacity of the system is such that some signal must suffer material degradation, the inferior signal obviously should not be that of a higher priority station. For this report and order in dockets Nos. 14895 and 15233, paragraph 5. However, no reason appears why it is necessary for the station itself to select the alternative channel. So long as the requirements of the rules are met, the CATV operator should be free to decide how its channels on its cable are to be utilized.

71. AMST further asserts that the CATV system should not have complete discretion under sections 21.712(d)(2), 74.1033(b)(2), and 91.559(b)(2) to select among substantially duplicating signals of equal grade where noncarriage of one or more is necessary to preserve the ability to carry the signals of independent commercial or noncommercial educational stations. It urges that the rule should be modified to set forth reasonable standards for selection, such as the respective preferences of the stations from the community, relative signal strength, respective audiences in the community—as measured by audience surveys, terrain considerations, and the like. We recognized in the first report and order in Dockets Nos. 14895 and 15233, paragraph 5, that leaving the selection to the CATV's discretion makes possible "d-



rimination between local signals in some instances." We further stated that we would closely examine complaints of abuse, particularly where the CATV operator has an ownership or other interest in one of the duplicating channels. We shall also give particular consideration to any allegation that the station not carried is one with closer community ties. The criteria suggested by AMST would not do away with the necessity for case-by-case resolution of complaints. AMST concedes (comments, p. 20) that any criteria for determining priority should not be inflexible and that an opportunity should still be provided for the submission of other data to the Commission. In the circumstances, it seems preferable to retain the rule in its present form until experience in its administration demonstrates what refinements might be needed or appropriate.

72. AMST also claims that exclusion of nearby network-affiliated stations in order to bring in distant independent stations which do not place a grade B signal over the community of the CATV, should not be permitted since "this would drastically affect the normal off-the-air competitive pattern of television service" (AMST comments, pp. 20-21). This provision is admittedly a "compromise approach," recognizing both that a CATV system owes its primary duty to the stations that are closest and place the best signal over its community, and also that carriage of nonnetwork signals may contribute to the diversity of service (first report and order in dockets Nos. 14895 and 15233, par. 9). The general questions of whether there should be some limit on the distance and number of nonlocal signals brought in, as well as the matter of "leapfrogging," are being considered in part II of this proceeding. Pending resolution of these matters, we shall retain the rule in its present form.

73. Next, AMST asserts that the installation of a switching device should be mandatory in all cases, whether or not the local signal is carried, so that the subscriber will not be foreclosed from off-the-air service where the cable system is inoperative or not operating properly. It is further urged that no exception should be made when the subscriber indicates in writing that he does not desire a switch, since the requirement could easily be avoided by a "small-print" waiver in the subscription contract. While these suggestions may have some merit, we do not think they warrant a revision of the rules. The rules are designed to protect local stations in areas which are crucial and essential to preserve and encourage service to the public. For the reasons stated in paragraph 51 of the first report, particularly that going to the sheer inconvenience of switching \* \* \*, we do not view this area as one of great significance, requiring further revision.

74. A further change suggested by AMST does, however, appear to warrant modification of the rules. Sections 21.712(d)(3), 74.1033(b)(3), and 91.559(b)(3) now provide that where a CATV system operates within the grade B or higher priority contour of both a satellite station and its parent, carriage of one will relieve the system of any obligation to carry the other. AMST points out that this should allow a CATV system in, or very near to, the same community as the satellite to carry only the parent station, causing the satellite to lose audience for which it may be originating some local programming.

and reducing its incentive to originate programs. It urges that satellites should be treated like any other station in accordance with the prescribed priorities. Since satellites operate on assigned channels and possess the potential to develop into regular stations, there is strong public interest in encouraging them to do so. Accordingly, sections 21.712 (d) (3) and (g) (3), 74.1033 (b) (3) and (e) (3), and 91.559 (b) (3) and (e) (3), together with the note to those sections will be deleted.

75. And, finally,<sup>41</sup> AMST suggests that CATVs be required to refrain from deleting or altering any portion (including advertising) of signals carried pursuant to the rules. Such a requirement is implicit in the carriage provisions and we would so rule upon complaint. The addition of an explicit provision does not appear necessary in the absence of some evidence of abuse. In this connection, we note that it is asserted in the comments of NCTA that some broadcasters who have requested systems to refrain from advance duplication of delayed broadcasts have later presented only a portion of the program. Since the CATV system is relying exclusively upon the signal of the local station to bring the program to its subscribers, the station has an obligation to present in full any program for which nonduplication is requested. Again, upon complaint we would rule accordingly. See also paragraph 158, first report. Moreover, same-day nonduplication will greatly reduce the likelihood of any incidents of this nature.

76. Accordingly, apart from the provisions relating to satellites and the changes occasioned by our disposition of the translator question (sec. 3 below), the carriage requirements of the new rules will be the same as the provisions now governing microwave-served systems.

### 3. *Translators*

77. Part I of the notice in this proceeding (par. 36) requested comments on two questions concerning translators: (1) Whether CATVs should be required to carry and not duplicate the signals of station-owned translators operating beyond the parent station's grade B contour,<sup>42</sup> and (2) whether translators should themselves be precluded from duplicating the programs of local stations.

78. With respect to the first question, the parties have expressed diverse views. The CATV interests and some of the broadcasters argue against extending any protection to translators outside the grade B contour because such translators are operating outside the normal service area of the parent station, do not provide a local service, and possess the potential for developing into regular local stations, and are relatively inexpensive to construct and operate. It is further asserted

<sup>41</sup> AMST also asks that the definition of substantially duplicating network program uses 21.710(f), 74.1001(c)(6), and 91.557(f) be modified to apply only to a situation where two or more stations are primary affiliates of the same network. While such a deletion might have been equally acceptable as an original matter, we do not think that the difference between the two is significant enough to warrant redoing the rules at this point. An additional proposal of AMST that the substantially duplicated concept be retained only for purposes of carriage has in effect been granted in view of the matters discussed in par. 58 above.

<sup>42</sup> Under the rules adopted in dockets Nos. 14895 and 15233, station-owned translators located within the grade B contour are treated as extensions of the originating stations (21.710(b), 74.1001(c)(2), and 91.557(b)). Such translators will be treated the same under the new rules.



that translators should not be protected because they may impede the establishment of local stations.

79. AMST, Storer Broadcasting Co., NAEB, and the Farm Bureau urge, on the other hand, that all translators (including those not station owned) should be carried in order to provide an incentive for the establishment of translators. Translators, they claim, should be encouraged because their service is received off the air free and covers a wider area than cable service. They would exempt translators from the carriage requirement where: (1) The CATV system is carrying the translator's parent station, (2) the CATV system is within the grade B contour of a station whose programming is substantially duplicated by the translator, or (3) the translator is supplying programming which substantially duplicates that of another translator whose originating station is closer. Nonduplication protection is not sought for the asserted reason that translators do not provide a local service or possess potential for developing into regular local stations.

80. We share the view that the public interest is served by encouraging expanded use of translators to bring television service to persons in rural areas and communities not now receiving adequate local television broadcast service. Apart from the fact that translator signals are received free and reach persons outside the urbanized areas served by CATVs, one of the major recommendations of the Seiden report is that increased consideration be given to the expanded use of translators. The report states (p. 22) :

Consideration should be given to the use of translators as a tool of structural policy. They require a substantially smaller investment than CATV and are compact, highly mobile, and can be sold in the secondary market. In general they provide the flexibility necessary in an industry in which structural policy must be kept free to adapt to technological and demographic change. Translators are ideally suited as a temporary communications medium, and their use should be required of broadcast licensees in fulfilling their obligations to the public by bringing their signal to all homes in their coverage area.

The report also recommends increased use of translators to broaden the coverage of UHF stations (p. 90).

81. We have already taken a step in this direction in the report and order in docket No. 15858, issued on July 9, 1965, amending the rules to permit 100-w UHF translators on any channel listed in the Table of Assignments unoccupied by a regular television station or satellite. The rules were also amended to permit 100-w UHF translators on all unoccupied UHF channels in the Table of Assignments in lieu of the previous limitation to the upper 14 channels. In addition, we have recently proposed to permit the use of microwave frequencies to relay programs to translators (notice of proposed rulemaking in docket No. 16424, FCC 66-41).

82. In line with this policy, we think that CATV systems should, upon request, carry the signals of commercial and educational translators operating in the community of the system with 100-w or higher power, where the system has the channel capacity to do so. Since non-carriage may effectively block the translator from access to CATV subscribers (par. 51 of the first report), the inability to reach the central core of the community may well destroy the incentive to establish

translator service for nonsubscribers in the community and persons the surrounding areas. Moreover, we think that same-day nonduplication should also be afforded to translators carried on the system. Translators operating with 100 w or higher power are properly distinguishable from other translators since they have greater potential for development into stations, and it is particularly important that such development not be impeded by CATV operations.

83. Accordingly, we shall add a fourth priority to the three already listed in the carriage provisions of the rules. Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power. As requested in the comments, exceptions will be added to exempt CATVs from the translator carriage requirement where: (1) The CATV system is carrying the originating station, or (2) the CATV system is within the grade B contour of a station carried on the system whose programming is substantially duplicated by the translator. The provisions of the program exclusivity sections will also be appropriately amended to require same-day nonduplication upon request of a translator station carried on the system.

84. With respect to the second question, whether translators should be required to refrain from duplicating local stations, our present policies and rules are as follows: Pending the outcome of this proceeding, we have been following a policy of conditioning UHF and VHF translator grants with the requirement that the translator, upon request of any station within whose grade A contour the translator operates, refrain from duplicating the station's programs either simultaneously or within 15 days. (*Lee Co. TV Inc.*, FCC 65-483; *Pike & Fischer, R.R.* 2d 257; *Report and Order in Docket No. 158*, par. 12.) Under section 74.732(e)(1) of the rules, the only station-owned VHF translators authorized outside the grade B contour of the parent station are high-power (100-w) VHF translators operating on assignments in the Table of Assignments. Moreover, section 74.732(e)(2) of the rules provides that a station-owned VHF translator which is intended to provide reception within the grade A contour of another station will not be authorized if there is any duplication, unless the translator is intended to improve reception within the principal city contour of the parent station. However, we have waived the provisions of section 74.732(e)(1) and (2) where a nonduplication condition was imposed.

85. Our translator rules and policies are currently in a state of flux. Part II of this proceeding (notice, pars. 61, 64) proposes a reexamination of all of our rules and policies relating to auxiliary services to see if they are holding back or encouraging a variety of off-the-air services. A number of measures were proposed in the comments in docket No. 14848, which were deemed beyond the scope of that proceeding but may be pertinent to this reexamination. It was suggested that multiple ownership and duopoly rules be amended to allow potential 100-w translator operators to convert these to regular stations and to encourage television station licensees to apply for them. Other suggestions included proposals for increased power for existing translators on other channels; removing the restriction in section 74.732

e)(1) on the use of VHF translators by television station licensees beyond their grade B contour: permitting translators to be used as relay stations (only) where the need exists: permitting multiple RF amplifiers for UHF as well as VHF translators; and permitting UHF stations to use VHF translators within their grade B contours. Moreover, AMST has recently filed a petition for a comprehensive, affirmative translator program which is being considered as a counterproposal to docket No. 14229, and will also be considered in our resolution of basic translator policies in part II of this proceeding.

86. We are not in a position to resolve these questions now. Moreover, we still lack sufficient information to determine the extent to which the rebroadcast consent provisions of section 325(a) may in practice limit duplication by translators.<sup>49</sup> In addition, if translators were required by rule to refrain from duplication within the grade B contours of regular stations, a question would be presented as to whether the provisions of section 74.732(e) (1) and (2) continue to serve a useful purpose or should be amended. It would be contrary to the public interest to delay a resolution of other portions of part I of this proceeding pending a thorough reexamination of the translator rules and policies. Nor does it appear advisable to undertake a partial revision of the translator rules at this point merely in order to attempt to equalize the position of translators and CATVs. In the circumstances, we think it best to defer rulemaking action until more basic translator policies have been established.

86a. In the meantime, we will continue to grant waivers of section 74.732(e) (1) and (2) in appropriate instances, and will condition station-owned VHF translator grants with a requirement of same-day nonduplication within the grade A contour. In view of our policy of encouraging UHF, we will not impose any nonduplication condition on UHF translator grants for facilities to operate in an all-VHF area. Nor do we believe it appropriate to follow any general policy of requiring a nonduplication condition where the translator applicant is not a broadcast licensee, e.g., a community sponsored translator. It would appear unlikely that such a condition is needed in, or would serve, the public interest. The rebroadcast provisions of section 325(a) may work with greater efficacy in the case of translators not owned by broadcast licensees. Further, the amount of duplication in this type of situation is not likely to be of a substantial nature, since local residents are clearly not apt to undertake the expense and inconvenience of translator operations supported by local assessments or donations unless a substantially different program service is being made available. In these circumstances, we do not think it desirable as a general policy to place any significant barrier,

<sup>49</sup> Although the notice requested information on the extent to which networks and their program suppliers, through contracts or otherwise, affirmatively restrict duplication by translators, no party except National Broadcasting Co. commented on this subject. NBC states that since 1960 it has followed a general policy of granting consent for rebroadcast of its programs provided that the translator is closer to its originating station than to any other NBC affiliate. In a few recent instances, NBC has given rebroadcast consent where the translator operated in an area served by an NBC affiliate, but only for NBC programs which were not broadcast by the local station. See also par 53 of the last report and order; *National Broadcasting Co.*, 20 Pike & Fischer, RR 1013; *Millers River Translators, Inc.*, FCC 63-504, 25 RR 516, 518, affirmed in *Springfield Television Broadcasting Corp. v. F.C.C.*, 328 F.2d 186 (C.A.D.C.).



not urgently needed, to the development of such community type translators. We shall, of course, consider whether additional requirements are appropriate, either upon request or on our own evaluation of a particular situation, and will make all translator grants subject to the outcome of part II of this proceeding. We will also take into account, where warranted in individual situations, the possible discriminatory effect of our interim translator policy upon any existing CATV system competing with the translator.

#### 4. Educational television stations

87. The rules adopted in dockets Nos. 14895 and 15233 require the carriage of noncommercial educational stations (ETV), but do not require CATVs to refrain from duplicating their programs. We followed this course because those proceedings were primarily concerned with commercial stations and many of the considerations discussed in the first report and order did not appear to be applicable to ETV. The notice herein recognized, however, that carriage alone might not be sufficient to promote the sound growth of local educational stations. Information was requested in this proceeding as to the nature of any further problems of ETV arising from CATV operations and what Commission action might be appropriate.

88. Other than educational interests, most of those commenting on this subject were against extending any nonduplication protection to ETV, for the asserted reason that the widest possible dissemination of educational material is in the public interest. It is further asserted that CATV competition has no economic impact on ETV because it operates on a nonprofit basis. National Educational Television (NET), the National Association of Educational Broadcasters (NAEB), and Eastern Educational Network (EEN) take a sharply different view in their more extensive comments. They claim that local educational stations, though different from commercial stations, have an even greater need for nonduplication and interim protection because CATV undermines the local financial support and other local interest which is vital to ETV operations. In this they are supported by American Broadcasting Co., AMST, and labor unions representing employees in the broadcast, CATV, and associated talent industries.

89. EEN and NAEB stress the importance of local financial support to educational stations. Although Federal grants-in-aid under Public Law 87-477 are available for the construction of educational facilities, the operations of such stations are almost entirely dependent upon local financial support. Operating income is derived primarily from (a) schools and universities, (b) local and State governments and (c) contributions and "subscriptions" from the general public and donations by local industries and businesses. Members of the public and local businesses will have little or no incentive to support the local station if ETV is made available on the cable by CATV impetration of outside educational stations. As EEN puts it (comments, p. 12); "It is wholly unrealistic to expect that the public will be willing to pay twice for educational service—to subscribe to CATV and to 'subscribe' to local ETV." Diversion of funds provided by local and area educational institutions and local and State governments for in-school television would be even more serious, since these

sources generally provide over one-half of the financial support for local educational stations.<sup>44</sup> If a distant ETV signal is available on the cable, and can be fitted into local schedules of instruction, local schools and local and State governments would be much more unlikely to provide the financial support and other interest necessary to start a local educational broadcast service. This would be particularly the case where the CATV offers to wire the urban schools "free." Unlike the local educational station, the CATV is in a position to make such an offer because it does not pay for programs or maintain expensive facilities for local program origination and it can recoup the cost of free school service through subscription fees charged to the general public.

90. Should CATV activity within urbanized areas siphon off sufficient local financial support to preclude the establishment of a local ETV station, the loss would be keenly felt by the public. The existence and viability of local educational broadcast outlets has special significance for ETV because the educational process is geared to local conditions and needs. Local ETV stations are more than mere facilities for delivering educational programs. They are an integral part of the educational and cultural life of a community and area. This is particularly true where ETV is used for inschool instruction. ETV must plan, prepare, and schedule educational programming on the basis of individual school and community needs, whether the basic program material is produced by the station itself or outside sources. The station also provides study guides for use by the teachers in the schools. CATV cannot effectively provide this carefully planned and prepared service by indiscriminately importing signals from distant educational stations located in cities with different needs and interests.

91. Moreover, local educational stations serve not only the schools and populations in the immediate community; they provide service to the surrounding rural area not reached by CATV. NAEB points out (comments, p. 2) :

Indeed, it is the rural area with limited budgets, facilities, and pupil concentration which has the most pressing need for the teaching resources of educational television. The specialized language, art, music, or science teacher who cannot be supported by a rural school system can, nevertheless, be enjoyed through the pooled resources of educational television.

In this connection we note also comments filed by the American Farm Bureau Federation, National Farmers Union, and National Grange stating that rural residents, who often are relatively remote from the entertainment attractions of the city, probably more than other groups of citizens in the country, rely especially on radio and television as a major source of entertainment and information.<sup>45</sup>

92. Accordingly, the educational interests urge that ETV stations be granted nonduplication protection for a period either the same as

<sup>44</sup> "The Financing of Educational Television Stations," report of a study conducted by Educational Television Stations, a division of the National Association of Educational Broadcasters, p. 19 (1965).

<sup>45</sup> Apart from ETV, it is stated that rural residents rely especially on local broadcasts bringing agricultural information, weather conditions (flood, frost, etc.), pest hazards, and current market conditions.



or much longer than that accorded to commercial stations.<sup>46</sup> Moreover, both NAEB and EEN urge the adoption of procedures to protect communities with educational reservations which have not yet been activated. NAEB requests that the CATV be required to notify local and area school authorities and ETV interests of its proposal to bring in a distant ETV signal. In this way, NAEB states, local ETV interests would be alerted and could bring the matter to the Commission's attention for whatever action or conditions appear warranted in the circumstances. EEN urges the adoption of interim procedures similar to those proposed for CATV operations in major markets in paragraphs 49 and 50 of the notice.

93. The considerations put forth by the ETV interests are not answered by simply stating that the public interest is served by the widest dissemination of educational material. If CATV operation should prejudice the establishment of new ETV stations on the unused reserved assignments or prevent existing stations from realizing their full potential, the result would be a narrowing of the distribution of educational material—a loss hitting hardest persons residing in rural areas and those unable to afford CATV fees. As in the case of commercial stations, CATV's proper role is to supplement, rather than to supplant, local educational broadcast service. The national policy of encouraging the full development and expansion of ETV is reflected in the grants-in-aid legislation (Public Law 87-477) and has long been a matter of deep concern to the Commission (sixth report and order, pars. 33-49). It would be plainly inconsistent with this policy to accord educational stations less protection than commercial stations if there is any real likelihood of prejudice flowing from CATV importation of outside ETV signals. Considering the continuous financial struggle of ETV and its dependence upon local financial support and interest, we think that the possibility of adverse effect is sufficiently strong to warrant some special protection for ETV.

94. In view of our decision to adopt same-day nonduplication for commercial stations and since it is asserted that effective nonduplication protection for ETV would require a much longer period, we do not think it appropriate to adopt 15-day before-and-after nonduplication for ETV, as requested by NAEB and ABC. There is no agreement among the educational interests as to what time period would be appropriate, and even an extensive nonduplication period would not solve the problem of achieving adequate operational funds for existing ETV stations. We believe that more effective relief to ETV can be provided by the approach discussed in the succeeding paragraph, than by delayed nonduplication periods such as 15 days before and after. Therefore, while recognizing that some measure other than nonduplication may be more suitable for ETV, we shall amend the exclusivity provisions to include educational stations. The rule will thus apply equally to all stations in line with our conclusion (par. 54 above) that they should be the same for all systems. We will, of course, be alert to guard against the possibility that CATV may pose a more acute problem for ETV than presently appears, and

<sup>46</sup> The longer period is sought because of the block distribution process for the NE scheduled service and distribution patterns of regional educational networks like EEN.

ould not hesitate to amend the rules should this subsequently prove necessary. ETV interests have indicated their intention to keep us apprised of any worsening developments and are encouraged to do so.

95. Perhaps the most troublesome problem raised by the ETV comments is the possibility that CATV, by bringing outside educational signals into communities where educational assignments have not yet been activated, will siphon off enough local support to preclude the establishment of an educational station. The policy of reserving channels for educational stations is in recognition of the fact that some time may elapse before such stations come into being. While the grants-in-aid legislation has speeded up the process in many areas,<sup>47</sup> the reservations still serve a needed purpose which should not be undercut. CATV provides a valuable service to schools and other subscribers by bringing in ETV which is not yet locally available. But this should not be at the expense of preventing a local service from ever being established. Accordingly, we shall adopt the suggestion of NAEB that local and area ETV interests and school authorities receive advance notice of CATV proposals to bring in outside ETV signals. The attached rules (app. D) require the CATV system to give notice of its proposal to bring in a distant ETV signal, at least 2 days prior to commencing service, to the local superintendents of schools and to the area and State educational television agencies (if any). This will enable ETV interests in the area to make objection to the CATV system where a local station is contemplated. Where a local ETV station is reasonably imminent and objection is made to the Commission, we would not ordinarily approve importation of the distant ETV signal unless it has been established after appropriate proceedings that this would not prejudice the establishment or maintenance of a local ETV service.

96. And, finally, it is asserted by NET and NAEB that, where an educational signal is carried on a CATV on a channel partially used for commercial signals, the placement of commercial announcements adjacent to educational material carried on CATV jeopardizes the public image of ETV and prejudices its position with program supporters and copyright owners who insist upon noncommercial presentation. However, we do not think that a sufficient basis has been shown for the relief requested, i.e., prohibiting commercial announcements adjacent to educational programming or requiring CATVs to devote channels exclusively to educational programming. We cannot undertake to preserve ETV or commercial stations harmless from all conceivable prejudice no matter how slight. Moreover, we are reluctant to interfere with CATV operations any more than necessary in the public interest or to impose requirements not shown to be essential. CATV systems with limited channel capacity and those carrying a large number of commercial signals might find it difficult to devote channels exclusively to ETV. CATVs may also wish to use educational signals to fill in portions of commercial signals which cannot be carried because of the nonduplication requirements. Moreover,

<sup>47</sup> The number of educational TV applicants in UHF (where most of the unused educational reservations are) has increased from 5 at the beginning of 1962 to 30 as of the end of 1965; during this period 34 more UHF educational stations went on the air.

since educational stations normally do not have as long a broadcast day as commercial stations, the CATV system may wish to provide its subscribers with other material during the time that the educational station is not broadcasting. In view of the station identification announcements made during the course of the educational programing, it seems to us that the prejudice to the originating ETV station, if any, would be minimal.

#### *D. Procedural Matters*

##### *1. Ad hoc procedures*

97. It has been suggested in the comments that the Commission should adopt specific rules providing for summary, nonhearing procedures to handle requests for waiver of the CATV rules or for different treatment or affirmative relief. We think the suggestion has merit. The general provision for waiver of any rule (sec. 1.3 of the rules) does not afford an adequate procedure for seeking additional affirmative relief or different treatment. Moreover, such procedures would be useful to handle requests for rulings on complaints or disputes. We recognize that to hold hearings upon each such request relating to carriage, nonduplication, and ETV, would be time consuming and burdensome to the CATV systems and stations involved, particularly those in smaller communities. In addition, while such procedure will not apply to the matter of distant signals in the top 100 market for which a showing made in evidentiary hearing is required (see para 141 below), they could be utilized in many instances to resolve distant signal questions in the smaller markets.

98. Accordingly, we have undertaken in section 74.1109 of the attached rules to devise flexible and fair procedures which will generally permit expeditious processing of such requests. The procedures require a written petition with notice to interested persons and afford an opportunity for submission of comments or opposition to any request and for reply. Upon good cause shown, the Commission may shorten the times specified in the rules for the filing of opposition or reply comments. The petition and all other pleadings filed by the petitioner or interested persons must contain a detailed full showing supported by affidavit, of any facts or considerations relied upon. In the case of complaints or disputes, the steps taken by the parties to resolve their problem must also be set forth. The Commission will, where possible, promptly dispose of the matter on the basis of such written submissions. However, additional procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, may be specified by the Commission if they appear necessary or appropriate after consideration of the pleadings.<sup>48</sup> In the event that the petition involves new service CATV subscribers, the Commission will expeditiously rule on the matter, either in whole or to the extent of determining whether the

<sup>48</sup> Since petitions under the ad hoc procedures may involve the resolution of controversial issues which in basic fairness should be determined on the pleadings of the parties, we shall amend the ex parte rules to make them applicable to proceedings under sec. 74.1109, as well as to proceedings under sec. 74.1107. The principles discussed in para. 9 of the report are order in docket No. 15384, FCC 65-598, 1 F.C.C. 2d 49, will also apply.



ould be a stay or other temporary relief pending such additional rocedures as may be required (see par. 100 below).

*Information to be filed with the Commission by existing CATV systems; notification by new CATV operations*

99. Pursuant to our authority under section 403 of the Communications Act, all existing CATV operators will be required to submit to the Commission, within 30 days after the effective date of our order herein, the following information with respect to each of their CATV systems: (a) The names, addresses, and business interests of all officers, directors, and persons having substantial legal or beneficial ownership interests in each system;<sup>49</sup> (b) the number of subscribers to each system both currently and as of February 15, 1966; (c) the television stations carried on each system; and (d) the extent of any existing or proposed program origination by each CATV system. Any CATV system which is located within the predicted grade A contour of a television station in the top 100 television markets (as ranked by NAB on the basis of net weekly circulation of the largest station in the market) and which carries the signal of a distant station(s) will also be required to submit a map showing the location of its cable lines being used to serve subscribers on February 15, 1966.<sup>50</sup> It is not practicable to apply the notification provisions set forth below to the present operations of existing systems, and there is no comprehensive or accurate listing of CATV systems available to apprise television station licensees or permittees of all existing CATV operations within their grade B contours. Indeed, we have noted that while the recent growth of CATV is of an impressive nature, there are conflicting estimates as to the precise dimensions of that very substantial growth. The information obtained will assist the Congress in its consideration of the Commission's legislative proposals in the CATV field, and the Commission in its consideration of matters in part II of the notice and petitions described in paragraph 149 below.

100. New CATV systems will be required to notify the licensee or permittee of any television broadcast station within whose predicted grade B contour the system will operate and the licensee or permittee of any 100 w or higher power translator located in the community of the system, with a copy to the Commission, concerning the proposed operation within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities. In no event may new service be commenced until 30 days after notice has been given. The notice shall include the name and address of the system, identification of the community to be served, the television stations to be distributed, and the estimated time for the commencement of operations. Similar notification will be required by existing systems which propose to add new distant signals (at least 30 days prior to commencing service) or to extend lines into obviously new geographic areas (within 60 days after obtaining a franchise or entering into a lease or other arrange-

<sup>49</sup> In stating the ownership interests in a corporation which has more than 50 voting stockholders, only those stockholders need be considered who are officers or directors or who directly or indirectly own 1 percent or more of the outstanding voting stock.

<sup>50</sup> Existing systems in the markets below 100 may subsequently be required to submit a map showing the location of lines as of a specific date in connection with any petition for such consideration of a geographic extension into new areas.

ment to use facilities or at least 30 days prior to commencing service where no new local authorization or contractual arrangement is required). In addition, as already indicated, notice to local and are educational authorities and ETV interests will be required at least 30 days prior to commencing service where carriage of a distant ETV signal is proposed. Such notification will afford the local television stations and other interested persons an opportunity to request carriage and nonduplication under the rules or to petition the Commission for different requirements before service is commenced and thus avoid disruption to the public. Where a petition for ad hoc consideration is filed with the Commission by any station, CATV system, or other interested person within 30 days after notice, new systems and existing systems proposing to add new distant signals shall not commence new service until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.<sup>51</sup> In the event that an evidentiary hearing is required, the question of whether there should be a stay or other temporary relief pending the hearing will be expeditiously resolved prior to the hearing on the basis of the pleadings of the parties and such additional written submissions as the Commission may request.

### *3. Form and enforcement of the new rules*

101. Aside from the obvious distinction that nonmicrowave CATV do not file applications for licenses with the Commission or use license facilities, no special problems of substance or procedure in making the carriage and nonduplication requirements applicable to them have been called to our attention and none is apparent to us. While the substantive requirements will therefore be the same for all systems, some differences in form or procedure are necessary in the case of the nonmicrowave CATVs. First, the obligations will be imposed directly on the CATV system itself, rather than taking the form of conditions on microwave authorizations. Second, enforcement will be through the cease and desist procedures set forth in section 312 (b) and (c) or pursuant to section 502, of the act and will not include other sanctions applicable to licensees. And, third, some change is required in the provisions requiring notification to all licensees or permittees of television stations placing a grade B or better signal over the community of the CATV system that a microwave application has been filed or request has been made of a common carrier for microwave service (See sec. 2 above.)

### *4. Retention of the microwave rules*

102. It is urged by American Telephone & Telegraph Co. and the U.S. Independent Telephone Association (both in comments in dock No. 15971 and in its petition for reconsideration of dockets Nos 1488 and 15233) that the rules governing microwave grants should be deleted when the obligations are imposed on CATV systems directly. We think it best to retain the rules conditioning microwave grants (revised herein) in their present form for a while longer, until CATV

<sup>51</sup> The matter of extension of lines into new geographical areas by existing systems in the top 100 markets is discussed in par 149 below. As already indicated, the ad hoc procedures do not apply to new service involving distant signals in the top 100 markets and obviate the need for evidentiary hearing as set forth in pars. 141-143 below.



generally are operating in accordance with the new rules. Pending such compliance, we cannot make the requisite public interest finding for the issuance of the microwave licensee in the absence of a showing that the facilities will be used in accordance with the conditions. Moreover, the requests of A.T. & T. and USITA are primarily grounded in the alleged burden to the common carriers, which will be substantially alleviated in this interim period by the revisions made in the memorandum opinion and order on reconsideration in dockets Nos. 1895 and 15233, 1 F.C.C. 2d 524. However, once widespread CATV compliance with the new rules has been achieved, some modification of the microwave rules would clearly appear to be appropriate and we shall take action toward this end as soon as it is possible to do so.

#### *Transition period*

103. In the first report and order (par. 161) and in the notice (par. 8), we stated that we would consider in this proceeding the question whether there should be some kind of transition period before the carriage provisions are made fully applicable to microwave and non-microwave systems with limited channel capacity. To obtain relevant information, the Commission mailed a questionnaire to every known CATV operator. The questions were designed to elicit specific information with respect to the effective channel capacity of each system, the local television signals which might fall within the carriage provisions of the rules, and the number of channels in use for nonlocal television signals or other purposes. Responses were received from 131 CATVs, of which 250 were microwave-served and 781 were nonmicrowave.

104. Upon analysis of the responses, it appeared that less than 20 percent of the microwave systems were not in compliance with the carriage provisions, and half of these either had the unused channel capacity to come into compliance, or, in view of plans to expand the system, would shortly be able to comply. Less than 10 percent of the microwave systems could not comply with the rules without having to drop one or more signals currently carried. Accordingly, the Commission, on December 8, 1965, determined that there was no need to afford microwave-served systems a general delay in the application of the rules relating to carriage, and notified all common carrier and Business Radio Service licensees serving CATVs that the rules would be effective on and after February 1, 1966, to renewal applications. We further advised such licensees that the renewal application should contain a request for waiver of the rules relating to carriage, if a waiver were desired, together with the following showing:

The request for waiver should include the petition by the CATV system that the microwave licensee seek the waiver from the Commission; and the system should include a statement that it has served a copy of that petition on any television station to be affected. The request for waiver should demonstrate the hardship to the CATV system, the disruption of service to the customers of the CATV system which would result from immediate compliance with the carriage requirements, the need for the particular length of time for which the waiver is requested, and the future plans to come into compliance. Finally, the request should state whether substitution of the local station's signal on a simultaneous-only basis will be afforded during the period for which any waiver is granted where the local station is not now carried and its programming is duplicated by a more distant signal. See *Black Hills Video Corp.*, 6 Pike & Fischer, R.R. 2d 199, at 201 (par. 9).

105. With respect to the 781 nonmicrowave systems who responded to the questionnaire, it appears that 605 are already in compliance with the carriage requirements of the rules. An additional 87 systems have sufficient unused channel capacity, or are expanding their capacity, and would be able to comply without having to drop any presently carried television signal. Two systems might have to utilize a channel presently carrying FM radio and CATV originated programming, and 10 systems furnished insufficient information for any conclusion as to their situation. There remain 77 systems which would have to drop one or more television signals presently carried in order to add one or more television signals required to be carried by the rules.

106. Thus, as in the case of microwave systems, it appears that only a comparatively small percentage of the nonmicrowave systems could not comply with the carriage provisions without substituting a local for a more distant signal. In the circumstances, we believe that there is no need to provide for a general transition period by rule. The problems of individual systems will be considered on a case-by-case basis upon a request for waiver making the same showing applicable to microwave systems. Accordingly, the rules will apply immediately to all new CATV systems commencing operations on or after their effective date, and will apply 60 days thereafter to existing systems unless a request for waiver has been filed with the Commission. Our aim is to allow an orderly transition period for the relatively small number of systems with limited channel capacity whose viability might be jeopardized by immediate application of the rules, or where existing service to CATV subscribers would be unduly disrupted (as against the *Black Hills* type of protection (6 R.R. 2d 199, at 201 (par. 9)) during the appropriate transition period).

107. The foregoing discussion of the apparent situation with respect to carriage does not take account of 100-w translators operating in the community of the CATV. Our decision (pars. 82, 83 above) to accord high-power translators fourth priority may raise some additional channel capacity problems. While this new provision will have the same effective date, waivers may be sought by microwave and non-microwave systems either within the 60 day period or upon receipt of any request for translator carriage which gives rise to some problem.

### 6. Copyright suits

108. Finally, we shall make brief mention of the copyright matter because, despite our plain statements in paragraph 159 of the first report, there would still appear to be some confusion on the part of some persons as to the effect of our carriage and nonduplication rules upon the pending copyright disputes. We have stated that our decision is not intended to affect in any way the pending copyright suits involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. Thus, the fact that we have given the local station the right to have its signal carried over the CATV system (and not duplicated for a reasonable period), affords no defense to that system in a copyright suit. The station cannot

know broadcast or transmission rights to programing which it does not own (or as to which it has not obtained a license to do so). See *Report on Rebroadcasting Rules*, 1 (pt. 3) Pike & Fischer, R.R. 9: 1133, 1134, 1137, where we stated in connection with rebroadcast rights under section 325(a), that the section "may no longer accurately reflect present conditions" since most programs were not owned by the originating station who could not therefore legally grant the rebroadcast permission sought. In short, if the copyright suits are decided adversely to the CATV industry, we may, as stated in the first report, have to revise our rules.<sup>51a</sup> We have acted now, in light of the present copyright situation, which would appear likely to obtain for some substantial period of time, and without the slightest intent of affecting the determinations to be made in the pending suits.

#### CONCLUSION AS TO PART I

109. The foregoing are the rules which we believe to be appropriate for all CATV systems at this time. We believe that they represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest "in the larger and more effective use of radio" (sec. 303(g)). We recognize further revision may be called for as we gain experience in their implementation. This docket (15971) remains open with this report designated as the second report, and we shall revise the rules, as the public interest requires, in our consideration of part II or upon the basis of new information or experience (and, if appropriate, after giving notice of such proposed revisions). Finally, as in the case of all rules, we shall give further guidance through the medium of rulings directed to specific situations.

110. In light of the foregoing, we find that the public interest would be served by modification of the rules previously promulgated for microwave-served CATV systems and the adoption of rules governing all CATV systems, as set forth in the attached appendix D. Authority for the rules adopted herein is contained in sections 1, 2(a), 3(a), 4 (i) and (j), 303, 307(b), 308, 309, 310, 319, and 403 of the Communications Act of 1934, as amended.

#### PART II. MAJOR MARKET, DISTANT STATIONS POLICY—PARAGRAPH 49-50 OF THE NOTICE

##### *A. The Notice; Comments*

111. In the notice, we stated (par. 49, 1 FCC 2d at p. 471):

\*\*\* pending the outcome of this proceeding, applications for microwave facilities to be used to relay the signal of any television station to a CATV system in a community with four or more commercial channel assignments and three or more stations in operation (or with at least two stations in operation and one or more stations authorized or applied for) must be accompanied by a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the area. A like showing must be made in applications for microwave facilities to serve a

<sup>a</sup> And, of course, stations will have to take into account the effect of any copyright decision in making requests for carriage under the present rules.



CATV system in a community where, because of its proximity to another community (or communities) having three or more existing commercial stations (e.g., within the grade B contour of such three or more commercial stations), any new UHF television station would be independent operation.

In paragraph 50, we specifically invited comment:

\* \* \* on whether the foregoing course of action as to applications before the Commission should be extended to the nonmicrowave CATV system in the same type of situation (e.g., through a rule which would prohibit extension of the signal of any television station beyond its grade B contour into a community with the situation described above (par. 49)), without there having been a clear and compelling showing that in the particular circumstances there is no threat to the development or maintenance of independent UHF service in the community.

112. We have considered the comments received on this important aspect. A summary of some of the comments is set out in appendix

### B. Evaluation

113. The discussion in appendix B gives some of the highlights of the comments submitted on this aspect. The more detailed showings have, however, been considered, and will be referred to in the ensuing discussion. While these showings are pertinent, particularly with respect to the trends which are so important to our evaluation, they do not supply definitive answers to the problems before us; rather, they serve to point up the problems and, in the circumstances, to the procedures called for. We shall develop the underlying considerations at some length, and even with some repetition of the discussion in part because of the great importance of the matter. There are two principal grounds for our action—(1) an economic impact ground, based on the trends in the CATV and UHF fields, and (2) a fair competition ground, based on the patently anomalous conditions under which the broadcasting and the CATV industries compete.

#### 1. The economic impact ground

114. *The UHF trend.*—As stated in our notice, we are at a watershed in the development of UHF broadcasting. UHF broadcasting generally suffered a very serious setback in the 1950's and limped along until the passage of the all-channel receiver legislation. In enacting this "unique" legislation in 1962, Congress made the judgment that development of UHF "is not only the best but the only practicable way of achieving an adequate commercial and educational system in the United States" (H. Rept. No. 1559, 87th Cong., 2d sess., p. 4; S. Rept. No. 1526, 87th Cong., 2d sess., p. 7). Such a system would "permit all communities of appreciable size to have at least one television station as an outlet for local self-expression," provide "at least three competitive facilities in all medium-sized communities," and make provision "for at least four commercial stations in all large centers of population" (H. Rept. at p. 3). Such a fourth station might make possible a fourth national network or the formation of "FM-type networks" in television, and also would be "valuable particularly for local programming and self expression"—an important need in many markets "because all of the available stations are network affiliates" (

et. at p. 3; S. Rept. at p. 4). Thus, as shown by the above and the compulsory sale of all-channel sets at the rate of over 9 million a year, Congress and the American public have staked a great deal on the development of UHF.

5. As we pointed out in the notice and our prior discussion, there is a very present indication that the all-channel set requirement is having its desired effect, with greatly increased interest in UHF, particularly in the many applications filed for the larger cities. Thus, from the beginning of 1962 to the end of 1965, the number of UHF commercial stations on the air increased from 85 to 100, and most significant as an indication of the trend, the number of applications pending (with multiple applications for the same channel counted as one) increased from 19 to 80. There are now indications of the beginning of a fourth network or of an "FM-type" network, involving UHF and VHF stations in some major markets. With this increased momentum in UHF, we believe that the next few years will supply the critical answer to whether the congressional goal of a truly nationwide television system employing both UHF and VHF on an effective intermixed basis will be achieved. (See II. Rept. at p. 7; S. Rept. at p. 4.)

6. *The CATV trend.*—The CATV trend is even more pronounced, and has already been noted in our first report, paragraph 65, 38 F.C.C. ¶ 709, and in the prior discussion (pars. 31–33). As stated, the CATV growth has been explosive and gives every indication of continuing its phenomenal spurt. In 1959, there were about 550 CATV systems, in 1965 at the time of the first report, there were about 1,300 CATV systems, and today—less than a year later—it is estimated that there are 1,565 (Television Digest, Dec. 27, 1965, at p. 3). Further, there are 1,026 CATV franchises which have been recently granted but are not yet operating (*ibid.*). The number of applications for franchises is even larger—an estimated 1,958.<sup>52</sup> Clearly, there is considerable substance to the statement of the official of one of the largest CATV groups, quoted in our notice (par. 39, 1 FCC 2d at p. 38):

The competition for CATV franchises is unparalleled in the history of American communications. It exceeds even the pell-mell scramble for television broadcasting permits that occurred throughout the United States in the first few months after the long television freeze in the late forties and fifties. We learn that new CATV systems are being sought or authorized at the rate of one a day \* \* \*.

7. Equally important is the changing nature of the CATV operation. In 1959, the average CATV provided three signals to its subscribers; in 1965 the majority provided five or more signals (par. 5 of first report), and the average system built today has 12-channel capacity.<sup>53</sup> There are now 20-channel systems proposed (e.g., the proposed proposal in Philadelphia), with industry leaders predicting

<sup>52</sup>As noted, the estimates as to franchises granted and applications vary. See pars. 31, 36, *supra*. NCTA reported recently that 1,500 applications for CATV permits had been filed in the last 12 months and that 1,200 were pending (N.Y. Times, Dec. 19, 1965). By way of estimate (e.g., TV Digest, AMST, NCTA), the figures are impressively large. In its reply comments (p. 18), AMST asserts that of 54 systems for which data was available and which began operations in 1965 (through July of 1965), only 5 were 5-channel systems; 44, or 81.5 percent were of 12-channel capacity.



that in the next 5 years "improved technology will have made the channel CATVs commonplace \* \* \*" (Television Magazine, Dec. 1965, p. 31). There is greatly increased use of microwave facilities (from 50 systems using microwave in 1959 to 250 in early 1965 to about 450 today). The distance which signals are taken has also increased greatly (to over 665 miles). Finally, the CATV industry has shifted its attention to the larger communities, and CATV franchises have been granted or are being sought in such cities as Philadelphia, Toledo, Cleveland, San Diego, Dayton, Baltimore, Syracuse, Albany, Sacramento, Pittsburgh, Birmingham and Fort Wayne. To quote again the large CATV group (par. 39 of the notice):

First, and of overriding importance, is the shift of CATV strength to new loci. The centers of the most intense CATV development now are in very large cities. In the past our attention was focused on the smaller markets and in these we reached about 2 percent of the Nation's television population.

But today we are in the throes of spirited competition for the development of cities such as New York, Philadelphia, Cleveland, Birmingham, Syracuse, Rochester, Wilmington, Norfolk, the entire State of Connecticut, and entire counties such as the 37 cities of Camden County, N.J., all of Montgomery and Chester Counties, Pa., etc. \* \* \*.

The CATV applicant believes that it can be successful in such cities because it will bring better reception (particularly as to color) and, most important, the programming of important independents (e.g., the three New York independents to Philadelphia).

118. It is apparent that these two trends (UHF and CATV) raise a serious question. Both CATV and UHF broadcasting, for example, are entering the larger markets, most often in an effort to bring programming that is not now available in these markets. There are at least 163 communities or areas with UHF stations operating, authorized, or applied for which also have CATV activity. In 68 such communities or areas, there are already operating CATV systems; 10 have CATV systems franchised but not operating, and 66 have CATV applications pending. In the notice, we set out as an example the Philadelphia area, where there are now three commercial UHF stations on the air (and another one authorized) and there are several well-financed CATV applicants seeking to bring in the signals of the three New York independents. The most critical question posed is how these two trends mesh in the ensuing years.

119. We have studied the comments carefully in this respect. While they give some indications (see par. 122, *infra*), the answer remains uncertain. On the one hand, the NCTA, relying largely on the Seiden report, contends that CATV in a large community such as Philadelphia can have little effect on the healthy existence of UHF stations; that anything, CATV will aid these stations by bringing them into homes where they might not otherwise be received. But we believe that this contention has significant defects.<sup>54</sup> In any event, it would appear

<sup>54</sup> The Seiden report assumed "an optimum" of 50 percent penetration of the Philadelphia market by the CATV (but see pars. 122-123 as to the "optimum" CATV penetration) and then, based on the fact that the three New York independent stations account for 1.3 percent of the TV homes during prime time, arrived at the conclusion that there would be a diversion from the Philadelphia UHF stations due to CATV of only 61,450 homes out of 1.3 million TV homes in Metropolitan Philadelphia (report, pp. 84-86). As already noted (n. 19, notice) the report measures the diversion as against the total Philadelphia

a crucial consideration is whether the Seiden report is correct in belief that in the large cities, it "is not clear as to what these CATV operators will offer that makes them think that they gain substantial numbers of subscribers in such areas" (Seiden report, p. 84). In his judgment, "potential CATV markets are those areas lying 40 or more distance from three full network signals \* \* \*" (id. at p. 83).

10. But very important segments of the CATV industry do not agree with the Seiden report. They are proposing to invest very large sums of money (including amounts such as \$40 million) in their belief that CATV, employing 12, 20, or even greater capacity systems, will gain very substantial audiences in these large markets. The leaders of such important CATV groups as Jerrold or Teleprompter believe that "almost all American cities—small and large—will be ready for television \* \* \*" and, in the words of the top official of Teleprompter, "within the next decade, 85 percent of all television stations in the United States may be receiving their programs by cable rather than over the air" (Television Magazine, Dec. 1965, p. 30). Another experienced CATV operator estimated more conservatively that CATV may reach 30 to 35 million households within the next decade (Broadcasting Magazine, July 26, 1965, p. 31).

11. We do not accept the above statements as necessarily correct, any more than we accept Dr. Seiden's assertion to the contrary. The real fact is that on the record before us, it is not possible to give a definitive answer to the future growth of CATV—to whether it will achieve very substantial penetration in the major markets and, correspondingly, to what its impact will be upon UHF developments in these markets.<sup>55</sup>

12. Indications in the materials before us would appear to indicate substantial growth and substantial impact by CATV in the large

cities, plainly ignoring the very facts upon which the analysis is based. The point is that whatever criterion is used to measure CATV impact, the same criterion should be used to measure the audience UHF would have without CATV. If, therefore, it is assumed that 9 percent of the CATV subscriber homes would, on the average, be watching the three network independent stations and would therefore be diverted from the three Philadelphia UHF stations, the resultant figure—61,450 homes—should be related not to the 1.3 million TV homes in Metropolitan Philadelphia, but rather to the average number of homes in Metropolitan Philadelphia that would be viewing the three UHF stations if there were no CATV. The audience for nonnetwork programming in Philadelphia is certainly no smaller than in New York (and indeed would undoubtedly be much smaller in the beginning). Therefore, 9 percent of the TV homes during prime time were assumed to be the number that, on the average, would be watching the three Philadelphia UHF stations; this would mean a total average audience of less than 120,000 homes against which the impact of CATV of more than 60,000 homes should be measured rather than against 1.3 million TV homes. In short, the Philadelphia audience which would be attracted to the New York independent stations is a very important part of the audience at which any independent Philadelphia UHF station must aim—a critical point ignored by the Seiden report.

We would also point out several other factors: (i) The potential effect on the UHF independent becomes even more serious when markets smaller than Philadelphia are concerned (see footnote 57); (ii) it is unrealistic to assume that UHF independents in such markets will have the financial base to bid for and obtain the same amount of expensive network film program as the New York VHF independents, with their much larger audience base, and thus, the CATV audience for nonnetwork programming may well not be divided equally between the UHF independents and the distant VHF ones; and (iii) the channel system would permit the importation of the New York network stations which would also contribute to diversion of audience during the 30-45 percent of time these stations are presenting nonnetwork fare.

13. The CBS study indicated that it had not included " \* \* \* a group of applications for CATV systems in communities with three more than adequate services \* \* \* applications for franchises \* \* \* in places like Albany, Syracuse, Galveston, Philadelphia, and Cleveland \* \* \*]. If these systems are established and thrive, it is probable that the potential for community antenna systems far exceeds anything that we have seen about thus far and, in fact, much of the country could ultimately become CATV territory." (CBS comments, exhibit A, pp. 16-17.) Thus, CBS focus was on the old or "regional" CATV and not the new developing trend in the industry.

markets. Thus, Midwest Television, the licensee of a San Diego station, submitted a study made by an independent research organization in late June 1965, of the San Diego area, the 51st market (A3 ranking on net weekly circulation), with three VHF stations and CATV systems which carry these stations and all seven Los Angeles VHF stations without nonduplication treatment. The study indicated that the CATV systems, with a present total of roughly 10,000 subscribers, are adding subscribers at a rapid rate. Thus, in one section where CATV had been available for only 3 months, more than 36 percent of the homes had already been wired for CATV; as of late June 1965, 60 percent of the CATV subscribers interviewed had been subscribers for less than 3 months (Midwest comments, dockets Nos. 15971, 148, and 15233, pp. 24, 28). But this study is obviously too fragmentary to be conclusive on this important question. The study also indicates a very considerable impact upon the local stations. See paragraphs 40-41, *supra*.<sup>56</sup>

123. There is no doubt as to the seriousness of the question posed. The new UHF stations face a difficult road; we would expect, with the passage of time and thus the build-up of all-channel sets, and related endeavors, that these new operations would be successful. But if a CATV, with 12- or 20-channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50 percent or over), the UHF stations might face a very difficult hurdle. The audience for nonnetwork stations is limited (about a 10-percent share in most markets in the prime time); and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the nonnetwork programs would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of common sense, since these established big city VHF independents certainly have the ability to bid for and acquire the expensive, attractive nonnetwork programming. Any gain in better reception of the UHF signals might be far outweighed by the splintering of the limited audience for independent programming. The UHF stations will in any event gain a very substantial audience in these markets, through the operation of the all-channel receiver law. While the CATV might bring them a little sooner or with somewhat better reception into some TV homes, it would appear to do so at the cost of fragmenting greatly the limited audience interested in viewing nonnetwork programming in the prime listening hours. See note 54, analyzing the Philadelphia situation on the basis of a 50-percent CATV penetration.<sup>57</sup> As pointed out, e

<sup>56</sup> To the same effect, see the address of Mr. George Blechta of Nielsen at the July 5 NCTA convention, where Mr. Blechta referred to an eastern television market "where a sample indicated that one-third of the viewers are CATV subscribers and that the stations have a combined share of audience of 85 percent among non-CATV homes in contrast to a share of 'less than one-half' among CATV homes." (Sponsor Magazine, July 1965, p. 14.)

<sup>57</sup> Further, Philadelphia is the fourth largest market in the country. But in smaller, even though still major, markets, similar analyses raise even more serious questions. Take the Sacramento-Stockton market (the 27th in ARB ranking) having 300,400 TV homes in the metropolitan area, 63 percent or about 189,000 metropolitan area homes on the average are watching television in prime time; without CATV, the UHF would do well to get a prime-time audience of 15,000 homes. While this audience, on the basis of our experience, would normally appear sufficient to support operation, obviously, significant division of the audience by CATV could be a serious matter. Yet CATV systems could be in the VHF independents from San Francisco and, as we understand, from Los Angeles. In this example, dealing with a major market, could be multiplied many times.



or application provision would afford virtually no relief, since non-network programming is not distributed on anything like a simultaneous nationwide basis.<sup>55</sup> The rise in advertising demand for television is also pertinent to this question: as noted (footnote 30), there are countervailing considerations which, at the least, require that this be considered in the context of the particular situation (e.g., in Philadelphia there are three and possibly four new stations to share increased advertiser demand). Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest in the larger and more effective use of radio" (Communications Act, § 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50- to 85-percent figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting.

14. It has been urged that we simply ignore the problem and let the markets in the major markets decide between CATV and the UHF broadcast stations. But for reasons already developed, such a course would be inconsistent with our statutory responsibilities and might lead to results inconsistent with public interest in a number of respects:

(i) CATV does not now serve the rural areas, and it has not been established that it can practically do so. If CATV were to undermine the healthy development of UHF, it would mean that people in the urban or more built-up areas would be getting additional service at the expense of those in the rural areas; we think that such a result is patently inconsistent with the public interest and the act's goals.

(ii) CATV is a form of pay-TV, in the sense that one must pay to obtain the television service. There are substantial numbers of people who either cannot afford to or do not wish to pay for television.<sup>56</sup> If then the CATV blocks development of UHF broadcasting, it would again mean that some people would be getting additional service at the expense of those who cannot afford or are unwilling to pay for such service.

(iii) Most important, CATV does not serve as an outlet for local self-expression. It does not present local discussions, the local ministers or educators, the local political candidates, etc. If events in the major markets should establish that CATV has prevented the healthy maintenance of UHF broadcasting, it would mean that, for example, New York independents would have been substituted for Philadelphia independents. We think that would be contrary to sound allocation principles, long established in section 307(b) of the act. It would be a clear frustration of the congressional purpose recently stated of making available in areas such as Philadelphia additional broadcast stations to meet the "important needs" for "local programming and self-expression" (par. 41, notice). It would also undermine the goal of a fourth national network built upon these additional stations (par. 41, notice).

<sup>55</sup>For would extension of the UHF station's signal beyond its grade B contour by CATV systems compensate for fragmentation within that contour by CATV systems having very substantial penetration. We note that CATV systems tend to bring in the distant big city audiences (since such stations constitute a better sales point in obtaining subscribers) than the new UHF stations. In any event, an independent's source of revenue is the local and national spot business, as to which the metropolitan area rating plays a very significant role. As shown by the above discussion, that rating could be seriously affected by the event of very substantial CATV penetration.

<sup>56</sup>Thus, even the CATV industry estimates that on an industrywide basis CATV systems in existence have achieved about 55 percent level of the total number of TV homes in the markets served, and that this figure will ultimately rise to 70 percent. (Television Magazine, Dec. 1965, p. 30).

125. If the New York independents sought translators to place their signals over the Philadelphia area, it could not seriously be argued that we should grant such applications on the ground that while they may be destructive of congressionally established goals, events in the market place should be allowed to give the answer. The matter is truly different here. The Commission has jurisdiction to "establish areas or zones to be served by any station" (303(h)), to make a "fair and equitable distribution of facilities among the several States and communities (sec. 307(b)), and "to perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions" (405). If then we sit back, even though we have the jurisdiction, the authority, and the responsibility to carry out the congressional policies, and do not thoroughly explore the serious question posed, we would be simply abdicating our responsibility "to promote the larger and more effective use of radio in the public interest" (sec. 303(g)).

126. To summarize, we have reached no final conclusion in this area—i.e., the effect of CATV development in the major market on UHF broadcasting. But we have concluded that there is a substantial problem of great significance to the public interest, which must be thoroughly explored. A critical consideration would appear to be the question of CATV's growth in the major market, since (i) if the growth is of a high order, its impact on UHF development may be very serious; and (ii) based on present considerations, the latter consequence will not serve "the public interest in the larger and more effective use of radio." In view of these conclusions, we think that a course of action is clear. We must thoroughly examine the question of CATV entry into the major markets, and authorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say, "I'm well, so sorry that we didn't look into the matter."

127. We have focused in the above discussion on the independent UHF station. But as interested parties such as Storer have stated, there is also a problem with respect to the new UHF station in a market with two VHF stations. The UHF station does not necessarily obtain a full line of network programming in such markets; either initially or for a considerable period of time, it may be dependent to a very substantial extent on nonnetwork fare. Further, several parties have expressed the fear that because of CATV, such new UHF stations will not be able to obtain a primary network affiliation. Finally, we note that to a significant degree, whether rightly or wrongly, CATV penetration would appear to have a discouraging effect on the entry of new UHF stations (or on the substantial expenditures which may be made for the high tower and power necessary for an effective operation). Permittees of several new stations have set out their fears of the consequence of CATV importation of distant stations from New York, Los Angeles, etc. To give but two examples:

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(i) The permittee of the new UHF station in Sacramento has informed the Sacramento City Council that the importation of outside signals from San Francisco-Oakland and Los Angeles, as proposed, would make it impossible for the UHF station to survive (joint comments, p. 15).

(ii) [Regardless of whether Jerrold's proposed Jacksonville CATV system will be subject to carriage and nonduplication], it is your permittee's belief that should Jerrold introduce through its proposed system the programs of the three television networks, it will be impossible for WJKS-TV to obtain the network affiliation required for its survival. (Statement of Rust Craft Broadcasting Co., permittee of UHF station WJKS-TV, Jacksonville, Fla.; AMST comments, p. 71.)

The above examples are not cited at this point for the correctness of the attitude taken toward CATV penetration in the particular situation, but rather for the attitude.<sup>60</sup> We think it important, in view of the critical period facing UHF, that the UHF entrepreneur be given a forum for thorough exploration of this serious problem.

18. The contentions of some of the parties with respect to pay-TV are also pertinent here. Several parties (e.g., ABC, Westinghouse, AMST) have stated that CATV, particularly if it succeeds in the larger cities, can readily branch out into pay-TV (for example, by providing that one channel will be "original" programming available only for a specific additional charge—a form of pay-TV somewhat akin to the Bartlesville experiment in 1957-58). The parties assert that whether or not pay-TV is desirable, it should be initiated only after full consideration in an appropriate proceeding and not "come in the back door" through CATV operations and profits based on the profits of the broadcast industry's product.

19. Whether a form of pay-TV operation will result from CATV is uncertain and would appear to depend again very largely upon the fourth factor, particularly in the larger cities which would naturally be the backbone of any wire-pay-TV operation. But we would agree that in the circumstances its authorization should stem from the Commission (or the Congress) after appropriate proceedings. For, what is involved is not the strictly wire pay-TV proposals such as recently attempted in California. A hybrid CATV-pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals (to provide the economic base for the pay-TV "fringing"), and such use of broadcast signals should be allowed only if it is found to be in the public interest. We have petitions now under consideration, which seek the authorization of pay-TV on a regular basis using broadcast facilities, perhaps only in the UHF portion of the spectrum. It is clear that until resolution of the very important policy issues, pay-TV operations based in substantial part on use of broadcast signals is inappropriate. Since here again the critical factor is the growth of CATV in the larger cities, we think that this is an added reason for the policy and procedure we have adopted, since the procedure will be especially applicable to such cities. We intend to explore thoroughly the relationship, if any, of proposed CATV operating in the larger markets and the development of pay-TV in the market. This is a matter which is also involved in part II of

<sup>60</sup>We note also that the contrary opinion has been expressed by some new UHF entrepreneurs (namely, that CATV operation will aid, rather than hurt them).

this proceeding, and will be the subject of a specific legislative recommendation of the Commission. See paragraph 153, *infra*.

130. We believe that the foregoing discussion, showing the serious question posed by the potential effect of very substantial CATV development upon UHF development and the possible adverse consequences to the public interest, demonstrates the need for the market, distant signals policy which we have adopted. Before discussing that policy (see pt. 3, *infra*), we shall turn to a second group which also, in our judgment, supports the need for the policy.

## 2. Fair competition

131. We have previously discussed this "fair competition" group in connection with the nonduplication requirement. See first report paragraphs 52-57, 28 F.C.C. 683, 703-706. That discussion, which was not be fully repeated, is pertinent here. As shown, the CATV industry is growing at a tremendous pace, with a changing nature (entering into major markets, with 12- or 20-channel systems, bringing the signal of big city independents such as those of New York and Los Angeles). If the CATV should achieve substantial penetration of these communities (50 percent or over), the result might be most serious to the new UHF independents in these same areas. This points up for critical consideration—that the nonduplication requirement will be virtually no assistance, since what is involved is the establishment of a healthy maintenance of *independent* stations, and nonnetwork syndicated or film programming is not distributed on a simultaneous nationwide basis. We therefore shall reexamine the fair competition considerations in the context of the present problem—the CATV and UHF trends and the need to develop a policy or procedure because of these trends.

132. A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount of a kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process, and this exclusivity is maintained, in large part, through the operation of section 325 of the Communications Act, which forbids the rebroadcasting of any station's signal without the consent of the originating station.

133. We have pointed out how the CATV system presently stands outside of the above program distribution process (pars. 54-55, first report, 38 F.C.C. at p. 704) :

[The CATV] has not been found subject to the requirements of section 325. [footnote omitted] It does not compete for network affiliation, nor access to syndicated programs, feature films, or sports events. It is not concerned with bidding against competing broadcasters for the right to exhibit these programs nor with bargaining with program suppliers for time and territorial exclusivity. Moreover, because the distant station whose sig-

is carried has no control over the CATV's use of its signal, the question of whether a program should be exhibited through CATV facilities in any particular market cannot be the subject of bargaining or agreement between the distant station and the program supplier—although the question of whether the same program should be rebroadcast in that market by a television station or a translator can be, and often is, the subject of such bargaining and agreement.

This is not the usual competitive situation. The CATV system and the local broadcaster provide the public with access to the same basic product—the programs created or sold for distribution through broadcasting stations. The broadcaster, however, must himself obtain access to the product in the program distribution market, with its various restrictions and conditions. The CATV operator need not enter this market at all.

34. The anomalies which result from this situation are even more marked in the case of the independent station, particularly in light of the recent CATV trend. Procuring attractive programming which will interest viewers is, of course, the most vital concern of the new UHF independents. For example, such stations may bid for and obtain exclusive rights to an attractive feature film package. No other station in the same market could show these films—but a CATV system, which never entered the bidding, might well bring in these same films from a distant market. If the CATV reaches very significant proportions—50 percent or more, the result is the loss of the exclusive right to which so much was paid and upon which so much may have been staked. And here we stress again that without the financial sustenance from entertainment programs, a station has no adequate economic base to serve as an outlet for local expression for all the people in its service area.

35. When the situation is viewed on an overall basis, rather than from the viewpoint of individual programs, the result is equally anomalous. The CATV seeks to secure as great a number of subscribers as possible in these major markets, aiming for a figure well over 50 percent if possible. Since the people in these markets have three full network services, it seeks to attract such a large number of subscribers, in large part, by bringing in the independent programming of distant city stations such as the New York or Los Angeles independents. And it obtains such programming by simply paying a common carrier to carry to it the signals of these distant stations (or by itself erecting a tall antenna on an appropriate high elevation to receive the signals and then relay them with suitable amplification along the way to the subscriber). The new UHF station also seeks to attract as wide an audience as possible in these same markets by bringing in attractive nonnetwork programming. But the UHF station cannot, either by means of a common carrier, its own microwave relay, or a tall antenna, evade that the best way to obtain such programming is simply to bring it in whole or in part, the programming of the New York independents. The established distribution process given congressional recognition in section 325(a), proscribes such conduct. (See letter to Mr. Martin E. Firestone, dated Dec. 16, 1965, FCC 65-1107.)<sup>61</sup> Both the

<sup>61</sup> As another example, in 1965, station KWOA desired to rebroadcast the signal of station WCCO, to present the play by-play broadcasts of the Minnesota Twins' baseball games. Station WCCO refused rebroadcast consent, largely because it placed a good signal into the air in question. This Commission determined that in view of WCCO's response and the particular circumstances, no action was called for. See letter to Mr. James J. Wychor, dated July 22, 1965.



broadcaster and the CATV thus have the same objective—providing as large a segment of the public as possible in these major markets with access to nonnetwork programs. The question therefore arises why the CATV should operate under one set of competitive rules and the broadcaster under an entirely different set. On its face, this competitive situation would appear to be a most unfair one.

136. Illustrations in the sports area further point up this anomalous situation and are particularly pertinent in view of the importance of sports programming, both to the CATV and broadcasting. The broadcast station (or its network) bids for the right to exhibit sports programming (see, e.g., \$37.6 million bid for CBS for the 2-year right to show NFL football games; *Broadcasting Magazine*, Jan. 3, 1965, 124); even then, those rights are at times circumscribed by black-out requirements (during home games), and other conditions permitted by Congress or the antitrust laws. See, e.g., Public Law 87-331. The broadcaster must operate in accordance with these established industry conditions. But the same sports program that is unavailable to the broadcast station is presently made available to the station's audience by CATV systems. In the words of the president and general manager of Wisconsin Valley Television Corp. (AMST commonwealth attachment B, p. 10, quoting the House CATV hearings on H.R. 77, p. 415):

Another serious problem: In Wausau, Wis., because of our proximity to Green Bay, WSAU TV is blacked out of the Green Bay Packers football games. This I can understand on behalf of the National Football League and the Green Bay Packers \* \* \*. I'm not allowed to carry the games. Any cable system can reach to any area and get these games—some via microwave. Then these games can be moved into WSAU TV's area. Can our station on a Sunday without the football game, while the cable system is running big ads in the local newspaper: "Get total television on cable television."

Now I would like to deliver total television but because of laws and rules and regulations, I'm not able to give total television. The cable system, with no laws, no rules, no regulations, can deliver to my audience, by FCC definition of tower height and power, much more television than I can deliver them because of the stricture that I must operate under \* \* \*."

137. The answer is sometimes given that the CATV system is simply a master TV antenna, and therefore on this ground should be allowed such different competitive conditions. But this answer does not withstand analysis. A CATV system which proposes to employ microwave to bring in signals 400 or 500 miles away is not a master TV antenna service. It cannot seriously be argued that CATV proposals to bring the New York independents to Dayton or the Los Angeles independents to Dallas-Fort Worth represent master TV antenna arrangements. Nor, whatever its validity in many instances, can the argument appropriately be made when a very tall antenna is employed on a high elevation, with many miles of cable and electronic gear to distribute the distant signals. In any event, the question remains: Is the distant signal freely available for use in the area, as the CATV argues, why is it not just as freely available for use by the broadcast stations in the area (e.g., through a tall antenna on a high elevation)? Clearly, however, it is inconsistent with all notions of propriety to say that a Philadelphia or Baltimore UHF station may make whatever use it desires, without permission or payment of the programming costs.

over the New York independents. See section 325(a), and its legislative history. The result of such "freedom of access" would be inequity and chaos.<sup>62</sup>

18. Here again we have reached no final determination but rather concluded that this is a question warranting thorough exploration in the hearing process. It may be that whatever the disparate conditions for operation, there is no need for concern because the CATV will not significantly affect the development or healthy maintenance of UHF television broadcast service. But as stated we cannot make that determination on the record now before us. It follows that on this ground also, there is need for a procedure pegged to full exploration of the issue in the context of an evidentiary hearing.

*The major market, distant signal policy, and procedure*

19. We have previously found that CATV can make an important contribution to the public interest, and we adhere to that judgment. CATV, along with other auxiliary services, has made a significant contribution to meeting the public demand for television service in areas too small in population to support a local station or too remote in distance or isolated by terrain to receive regular or good off-the-air reception. It has also contributed to meeting the public's demand for reception of multiple program choices, particularly the three network services. In thus contributing to the realization of some of the most important goals which have governed our allocations concerning CATV, CATV has clearly served the public interest "in the larger and more effective use of radio." And, even in the major market, where there may be no dearth of service (e.g., Philadelphia, with three full-time network services, and four independent UHF stations either on the air or authorized), CATV may, we recognize, increase viewing opportunities, either by bringing in programming not otherwise available or, what is more likely, bringing in programming locally available but at times different from those presented by the local stations. But this contribution (and related ones such as better reception, etc.) should not be made at the expense of healthy maintenance of UHF operations. We have reached no determination on this critical matter. Rather, we have decided that a serious question is presented whether CATV operations in the major markets may be of such nature or significance as to have an adverse economic impact on the establishment or maintenance of UHF stations or to require existing stations to face substantial competition of a patently unfair type. We have also indicated our concern with the relationship, if any, of proposed CATV operations on the large markets and the development of pay-TV in those markets.

20. Our policy and implementing procedure are therefore addressed squarely to these serious questions. The basic thrust of con-

<sup>62</sup> The answer that the CATV does not have a "free ride" in view of the cost of the cable itself, misses the point, since the cost of the disseminating system is no basis for exemption from observance of the fundamental distribution process by which the program product is obtained. Both the CATV and the UHF station have substantial costs of construction, maintenance and operation. Thus, the most recent UHF station in Chicago, Ill., had a construction cost of about \$3,000,000, with substantial estimated yearly operating expenses, including those sums allocated to programming costs. The UHF station cannot appropriate the programming of the New York independents, without consent or payment, nor can it avoid what its costs are.



gressional policy in the Communications Act is to resolve such important questions, in the context of appropriate evidentiary hearings, before consequences possibly adverse to the public interest develop. (Cf. sec. 309 of the Communications Act.) We think that that policy should be applied to this situation. We have determined that we have jurisdiction over CATV necessary to carry out the provisions of the Communications Act (such as secs. 1, 4(i), 303 (g), (r), (s), and 307(b)). It is important, we think, to exercise that jurisdiction with respect to CATV operations in the major markets, so as to insure that such operations will be consistent with the public interest. And to accomplish this, it is necessary to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest.

141. We shall accordingly follow a procedure whereby the signal of a television broadcast station shall not be extended beyond its grade into the top 100 major markets (as ranked by ARB on the basis of net weekly circulation of the largest station in the market) by a CATV system which has obtained a franchise for operation in such a market, except upon a showing made in an evidentiary hearing that such operation would be consistent with the public interest, and particularly the establishment and healthy maintenance of UHF television broadcast service. In this way, the Commission will be able to explore in depth the details of the proposed CATV operation, the market studies which have been made relating to it (by either the CATV or broadcast groups in the area), the present and potential picture as to television broadcasting in the market, the positions and showings of the interested CATV and broadcast parties, the possible plans and potential of the proposed CATV operation for pay TV, and other important factors. After such exploration, the Commission will be in a position to make an informed judgment directed to the facts of each particular case.

142. We believe that the procedure which we have adopted is the most and best suited to promote the public interest, taking into account both the development of the broadcast and the CATV industries. This is in line with the urging of several parties that what is needed is an evidentiary hearing. While the hearing urged has usually been of an overall nature, we believe it best to consider these important matters in the context of the particular request and the particular situation.

143. We recognize that the evidentiary hearing may consume a significant period of time. But as stated, the public interest requires thorough exploration of the very important issues raised; they cannot be sloughed aside or the answers lightly assumed. Further, the requirement for an evidentiary hearing has been confined to the top 100 markets, where there is generally no dearth of service and where UHF services are coming on the air. For example, in Philadelphia there are three VHF network affiliated stations, three UHF network

pendents on the air, with a fourth authorized. In the markets below 100, where there may be a greater present need for additional television service, the general *requirement* for evidentiary hearing is inapplicable. See paragraph 146, *infra*.

44. We have selected the top 100 markets for special attention because it is in these markets that UHF stations or wire pay TV and upon CATV operations are most likely to develop and therefore the problems raised are most acute.<sup>100</sup> Further, as noted, any delay in commencement of CATV operation because of the necessity for evidentiary hearings is mitigated by the consideration that these markets generally have a considerable amount of presently available and prospective new service. Finally, the top 100 markets include roughly 40 percent of the television homes in this country. Our policy therefore focuses on the critically important areas.

45. Admittedly, there can be substantial problems affecting the public interest where the CATV system proposes to extend the signals of broadcast stations beyond the grade B contour into areas below the top 100 markets. But there are differences between the two situations which call for different procedures. In markets below the top 100, the independent UHF (or VHF) station is much less likely to develop; the stations in such markets are apt to be three or less in number and network affiliated. This means, in turn, that the non-duplication provision is effective (since network programming will be significantly involved), and protection of a station's network programming should contribute very substantially to insuring its continued viability. It would appear that network programming will continue to be available in such markets; in the unlikely event that such programming becomes unavailable because of CATV impact, there would appear to be other appropriate remedial action which can be taken. Further, it is in the markets below 100 that there may be underserved areas where CATV can make its most valuable and traditional contribution. Indeed, the market division which we adopt is really a division between CATV in its traditional sense and the new, revolutionary facet of CATV, as posed by its entry into the major markets. In the latter which peculiarly requires the most thorough examination in the context of an evidentiary hearing.

46. We think, therefore, that a fair compromise is to draw the line as to special attention (i.e., evidentiary hearings) at the 100th market, and below that point, simply to take such action as may be

<sup>100</sup> Some question may arise as to whether a particular system is located in a market community within the top 100. For clarification, we have specified that the above provisions are applicable to a CATV located in a community coming within the predicted grade A contour of any station in one of the top 100 markets. We have employed the grade A contour of a station since, while stations often are located at different sites or have different powers (and thus different A contours), these grade A service areas in the same market have a tendency of becoming fairly close to one another over a period of time. In any event, we think that this is an appropriate criterion since it encompasses the essential area upon which new UHF broadcast operations in the market would be based, without including the much larger areas falling within the grade B contours, as has been urged by some in this proceeding. Because our effort is to carve out such an essential area upon which new UHF development would be vitally based, we have employed the predicted grade A contour; use of the predicted contour should also have the advantage of definiteness and easier administration. In the unusual instance where the requirement may be inappropriate, waiver can be sought. Where a CATV system is located within the top 100 markets when a hearing is commenced, the hearing will be continued even if these markets change in a subsequent ARB rating. We note that the 1965 ARB listing makes no change in the 1964 listing of the top 100 markets except as to relative standing within the 100.

necessary in the public interest, upon appropriate petitions bringing substantial questions to our attention. See paragraph 98. We shall not necessarily hold evidentiary hearing in connection with such petitions in the smaller markets. Such hearings could be a considerable burden both upon the CATV operation and the broadcaster in the small communities. See paragraph 78, first report, 38 F.C.C. page 714. Indeed, the hearing might thwart the initiation of needed service. Therefore, while hearings might be held in some instances, we have devised flexible procedures generally to treat expeditious petitions or requests involving the markets below 100, since we recognize that to hold hearings upon each such petition or request might be burdensome to all parties involved and to the public.<sup>64</sup>

147. *The question of grandfathering.*—On February 15, 1966, we issued a public notice giving the essence of our determination in this respect. Systems not yet in operation on February 15, 1966, and proposing to extend the service of a station beyond its grade B contour into one of the top 100 markets will come within the scope of our major market procedure, and must make the necessary showing in an evidentiary hearing. In view of the very great desirability of avoiding the disruption stemming from action applicable to an operating system and the strong public interest considerations underlying our policy, we think good cause exists for immediate effectiveness of the major market rules upon their publication, as suggested by some of the parties. A line must be drawn as to "grandfathering," and we believe it appropriate to do so upon the basis of operation on the date of the public notice. A system which has gone into operation by extending signal beyond their grade B contour to subscribers in the top 100 markets for the first time after that date, would be subject of a cease-and-desist proceeding.<sup>65</sup> Since we shall not "grandfather" systems coming in operation after February 15, 1966, the effectiveness of our action, practically speaking, is geared to that date. We could follow normal procedure and wait until 30 days after publication in the Federal Register to proceed against systems commencing operation after February 15, 1966, in the top 100 markets. But we do not believe that this hiatus would serve any useful purpose or the public interest. For, in this interval, a system might commence operation after the February 15 date and make "drops" to a significant number of subscribers, all of whose CATV service could be ended when the Commission institute cease and desist proceedings as to the CATV operation. In the circumstances here, where "grandfathering" is pegged to the February 15 date, we think that orderly procedure and the desirability of avoiding disruption as much as possible call for immediate Commission action.

<sup>64</sup> As previously stated (in 51, first report, 3 F.C.C. at p. 715), we will, as required by the Communications Act and consistently with its procedural specifications (e.g., sec. 309), examine any question raised in connection with individual microwave applications which bears on the public interest in the particular applications involved.

<sup>65</sup> We recognize that this may catch some systems just prior to the commencement of operation. But this will always be true in the case of any policy in this area, and in any event, if the policy is to be effective and achieve the above described goals, it must be implemented immediately. We also point out that parties have known of the Commission proposals for a major market procedure since Apr. 23, 1965 (and of the counterproposal since July 26, 1965). The notice expressly " \* \* \* put all persons who now operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (notice par. 65, 1 F.C.C. 2d at 477). Finally, in the unusual case, we can consider the matter upon petition for waiver.



rather than the Commission waiting passively on the sidelines for the 30-day period to expire. Good cause therefore exists to make the rules retro to the major market procedure effective upon publication, so that we may proceed forthwith against any system operating in contravention of those rules.<sup>66</sup>

48. The essential purpose of our policy is to take hold of the future—to insure a situation where we or the Congress, if it chooses, can make the fundamental decisions in the public interest upon the basis of adequate knowledge. So far as the application of our major market distant signal policy, we do not intend to disrupt the existing situation, by withdrawing from any CATV subscriber any signal which he was receiving as of February 15, 1966, in the top 100 markets or which he is presently receiving in other markets.<sup>67</sup> Based on our experience, we regard such a withdrawal as impractical and, in any event, we note that we have not made any basic policy judgment which would warrant such undue disruption. We therefore shall “grandfather” all systems which were in operation upon February 15, 1966 (the release date of the above mentioned public notice), to the extent that such systems need not make the showing in section 74.1107 to continue to carry to subscribers signals beyond their grade B contour, which were being supplied to those subscribers on that date. But any addition of a new distant signal on an existing system in the top 100 markets would come within the major market policy.

49. The foregoing dealt with grandfathering. We turn now to the question whether systems extending signals beyond their grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographical areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing).<sup>68</sup> While there may be a disruptive factor in stifling CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the

<sup>66</sup> Similar good-cause grounds are applicable to the provision of the rule dealing with markets ranked below the 100th (74.1107(c)), since the public interest would not be served by permitting situations to continue to develop which raise substantial questions and may result in either disruption of service or inability to take an otherwise desirable action because of the factor of disruption. We shall also make effective upon publication the procedural provisions (secs. 74.1105, 74.1109) which relate to sec. 74.1107.

<sup>67</sup> As to the application of our carriage and nonduplication rules, see pars. 49, 68, 106.

<sup>68</sup> And certainly where a new franchise or amendment of an existing franchise after Feb. 15, 1966, to operate or extend the operation of the CATV system in the same general area is involved, the requirement of an evidentiary hearing will be applicable.

geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and responses in the particular case, whether such temporary relief is called for, and if so, its nature. In view of the nature of the problem, the Commission will give expedited treatment to petitions in this area. Finally, we wish to stress one important facet: We have previously put all parties on notice as to the pendency of our proposal and have now put parties on notice that there should not be expansion of major market system from a few thousand subscribers to a very substantial number of subscribers until resolution of the public interest issues posed. We expect CATV operators to heed this notice and not to attempt to circumvent orderly consideration of any petition in this respect by an extraordinary effort to wire up the community or a substantial portion of it. In any event, we are requiring the submission of data showing the extent of construction of the system as of February 15, 1966. While we expect the ordinary wiring operations to have continued since that date, any extraordinary wiring efforts or entry into patently new geographical areas (e.g., extension of a system from a suburb into the main community) will be at the risk of the system and will not be accorded weight in the judgment to be made.

150. As we gain more knowledge in this important area, particularly from the hearings being held, we shall revise or terminate the procedure, as the experience indicates. The present rules are our best judgment of what the public interest now calls for. We recognize that they may not perfectly fit every situation, and repeat that should they be inadequate or unduly burdensome in individual cases, special action or waiver can be obtained upon an appropriate showing. *United States v. Storer Broadcasting Co.*, 351 U.S. 192.

151. Finally, we stress that the rules do not halt CATV service or growth. With the possible exception of the applicability of our carriage rules (see par. 66), the CATV viewing public will not be deprived of any distant signal service which it was receiving as of February 15, 1966. CATV will not be precluded from bringing new service to underserved areas or from bringing better reception in cities such as New York. With possibly only the rarest exception, CATV activity which does not involve extension of a signal beyond its grade B contour may freely continue.<sup>60</sup> CATV expansion into markets below the top 100 may also continue and will be the subject of Commission scrutiny only upon petition in a particular case. Thus, we have confined our special attention to the area of most concern—the top 10 markets where UHF stations are most likely to be coming into existence. And, in line with our present general policy in dealing with microwave applications (see par. 49, notice, 1 F.C.C. 2d at p. 471

<sup>60</sup> If two major markets each fall within one another's grade B contour (e.g., Washington and Baltimore), this does not mean that there is no question as to the carriage by a Baltimore CATV system of the signals of Washington; for in doing so and thus equalizing the quality of the more distant Washington signals, it might be changing the viewing habits of the Baltimore population and thus affecting the development of the Baltimore independent UHF station or stations. Such instances rarely arise, and can, we think, be dealt with by appropriate petition or Commission consideration in the unusual case where a problem of this nature might arise.



we have specified no "freeze" but rather a full exploration of the facts in each case, so that we may make an informed judgment on this most important question. We believe that this is a reasonable way to proceed, and that the public interest requires no less a procedure.

52. *Legislative proposals.* — The foregoing discussion treated matters in part I and paragraph 50 of the notice of proposed rulemaking. The remaining matters in part II of the notice will be considered on a basis of the comments filed in that part and the experience gained. For the reason also, this report is designated as the second report. We turn now to a brief discussion of the legislative proposals which we believe are desirable.

53. There are four areas which we shall urge to the Congress as particularly warranting its attention:

(i) As we stated in the notice, we are clearly concerned here with new and important questions of policy and law in the communications field. We therefore state again that we would welcome congressional guidance as to policy and congressional clarification of our authority in all respects in this field. See notice, paragraph 31, 1 FCC 2d at page 465.

(ii) We believe that congressional consideration of the pay-TV aspects of CATV is particularly called for. For the reasons stated in paragraphs 128-129, we shall urge that Congress prohibit the origination of program or other material by a CATV system, with such limitations or exceptions as are deemed appropriate. A hybrid CATV pay-TV operation would be based, in an integral and substantial fashion, on use of broadcast signals, and such use of the broadcast industry's signals would appear to be both inequitable and inconsistent with the public interest. It is inequitable because it is clearly unfair to use the broadcast industry's product as a basis for wire-pay-TV operation which could adversely effect that industry or indeed supplant it. More important, were wire-pay-TV to supplant free television broadcast service, it would be inconsistent with the public interest, since it would mean that the public would receive, at least in large part, the same service it now does, but for a fee. Finally, we are considering petitions seeking the authorization of pay-TV in the broadcast spectrum.

(iii) We believe that Congress should consider whether there should be a provision similar to section 325(a) applicable to CATV systems (i.e., whether, to what extent, and under what circumstances CATV systems should be required to obtain the consent of the originating broadcast station for the retransmission of the signal by the CATV system). We have described the presently anomalous conditions under which the broadcasting and CATV industries compete. See paragraphs 131-138.<sup>56</sup> Several parties

The problem is further pointed up by the recent controversy involving the telecasting of certain of the Notre Dame home or away games by station WNDU-TV, South Bend, Ind. See letter to Mr. Asa S. Bushnell, dated Oct. 28, 1965, public notice, dated Oct. 29, 1965, No. 75429. Under the NCAA television regulations, the station was allowed to telecast such games, but permission to do so was temporarily withdrawn because CATV systems, without WNDU-TV's consent, would then pick up the station's signal and carry it to areas not coming within the regulations. The NCAA television committee, while it is continuing to study the matter, recently adopted a new regulation stating:

Any televising privilege granted under article XIII (a or b), or XV shall apply exclusively to the station or stations specified, and shall be limited to such station or stations. Any extension of such an authorized telecast or its stipulated area of coverage by means of commercial microwave, cable, or community antenna television operation shall be construed as a violation of the rights accorded, and shall preclude favorable consideration of further authorizations of this nature. (Report of the 1965 NCAA television committee, Jan. 10-12, 1966, p. 31)."

Under this unusual situation, the local broadcast station could lose the opportunity to present a program of great interest to its area (as the NCAA plan recognizes in its regulations), because CATV systems over which it has no control carry the program beyond the specified local area (conceivably for hundreds of miles).

Indeed, the anomalous conditions could have an adverse effect on development of new program sources. Multiple owners such as Westinghouse or Metromedia have undertaken some development of new programs; this endeavor promotes the public interest by increasing the programs available and diversifying their sources. But, as Westinghouse points out, the undertaking is a difficult one, which might not be sustained if the programs are brought into the major markets by CATV systems of significant size or impact, thus diminishing or ending the opportunity for the sale of the programs in these markets. The same consideration might be pertinent in the case of the development of a fourth network.

such as NBC have urged that a section 325(a) approach would obviate the need for much, if not all, of the Commission regulations in this area and would serve the public interest. We are not in a position to state whether the section 325(a) approach would be effective and fully consistent with the public interest. We think that this is a matter warranting congressional (and Commission) consideration, including such aspects as how a "transmission consent" requirement would function as a practical matter, whether systems in small communities should be dealt with specially, and whether grandfathering is appropriate and the nature of any such grandfathering.

(iv) Finally, Congress will be asked to consider the appropriate relationship of Federal to State-local jurisdiction in the CATV field, with particular reference to initial franchising, rate regulation, and extension of service.

#### CONCLUSION

154. Authority for adoption of these rules is contained in sections 1, 4(i), 303, 307(b), 308, and 309 of the Communications Act. We wish to stress particularly the provisions of section 1 that the general purpose of the act is to "maintain the control of the United States over all the channels of interstate and foreign radio transmission \* \* \* under licenses granted by Federal authority"; of section 303(h), "to establish areas or zones to be served by any station"; of section 307(d) to make "a fair, efficient, and equitable distribution of radio service among the several States and communities"; section 303(g), to stimulate new uses of radio and generally encourage the larger and more effective use of radio in the public interest, and section 303(s), the "all-channel receiver" section. The rules we adopt here, under the rule-making power bestowed upon the Commission in sections 4(i) and 303(e), are designed to "study new uses" and insure future CATV activity and growth consistent with the "larger and more effective use of radio in the public interest." Indeed, the type of situation here involved is the very reason for the creation of this agency as the history of early chaos in the radio field shows. As the Supreme Court has stated, the Communications Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, its grip on the dynamic aspects of radio transmission" (*FCC v. Pollock Radio Co.*, 309 U.S. 134, 138; see also *NBC v. U.S.*, 319 U.S. 190).

155. In this connection, we stress that we are not committed to the status quo—to protecting existing investment against new technological advances. The whole history of this art has been one of growth, change, from radio to television to perhaps tomorrow satellite broadcasting or laser communication. It may be that CATV, if allowed full unfettered growth, would prove to be an excellent supplement bringing additional service and diverse programming to millions of people in built-up areas who can afford it, without detriment to the provision of additional local broadcasting service to the entire Nation. If so, the information obtained in the hearing process will provide that indication, and will be the basis for authorizing such growth. But we cannot make that judgment in the record now before us—and, instead of the above picture of wire television as an excellent supplement, there is the possibility that the Nation might find itself with a system half wire, half free, which is destructive of the larger goals of additional networks, additional outlets for local expression, and which provides increased service to some in the city.

the expense of those in the rural area or those who cannot afford to pay. It is, we think, time to get the facts, and in light of the service presently available, there is time to get the facts.

156. Accordingly, *It is ordered*. This 4th day of March 1966, that the rules contained in the attached appendix D are adopted, effective April 18, 1966; *Provided, however*, That the provisions of section 74.1103 are not effective as to existing operations of nonmicrowave CATV systems until 60 days thereafter, and provided further that the provisions of sections 74.1105, 74.1107, and 74.1109 are effective immediately upon publication in the Federal Register.

*It is further ordered*. That pursuant to section 403 of the Communications Act, all CATV systems in operation on April 18, 1966, shall within 30 days thereafter file with the Commission the information described in paragraph 99 of this report.

*It is further ordered*. That the proceedings in docket No. 15971 are not terminated and that, in light of the comments on part II of docket No. 15971 and/or such further proceedings as the Commission may order, amendments may be made to the rules set forth in the attached appendix C or additional rules may be adopted.

*It is further ordered*. That the proceedings in dockets Nos. 14895 and 15233 are terminated.

#### APPENDIX A

Comments and/or reply comments on part I and paragraph 50 of this proceeding were filed by:

- AFL-CIO affiliated labor organizations
- Allied Artists Television Corp.
- American Broadcasting Co.
- American Cable Television, Inc.
- American Farm Bureau Federation
- American Telephone & Telegraph Co.
- Aroostock Broadcasting Corp.
- Association for Competitive Television
- Association of Maximum Service Telecasters, Inc.
- Black Canon Broadcasting Co.
- Bonneville International Corp.
- Clearview of Georgia, Inc.
- Columbia Broadcasting System
- D. H. Overmyer
- Entron, Inc.
- Eastern Educational Network
- Fuqua Industries, Inc.
- G. T. & E. Service Corp.
- Houston Post Co.
- International Telemeter Corp.
- Jack O. Gross, d/b/a Gross Broadcasting Co.
- Jerrold Electronics Corp.
- Journal Co.
- Joint comments of stations KHOU-TV, KOTV, KXTX, WANE-TV, WAVE-TV, WFIE-TV, WFRV, WISH-TV, WJXT, WMT-TV, WNOK-TV, WTOP-TV
- Meredith Broadcasting Co.
- Mesa Verde Broadcasting Co., Inc.
- Micro-Relay, Inc.
- Midwest Television, Inc.
- Mobile Video Tapes, Inc.
- National Association of Broadcasters

National Association of Educational Broadcasters  
 National Broadcasting Co.  
 National Community Television Association, Inc.  
 National Educational Television  
 National Farmers Union  
 National Grange  
 Phillips, Nizer, Benjamin, Krim & Ballon  
 Rogers TV Cable, Inc.  
 Rust Craft Broadcasting Co.  
 San Diego Telecasters, Inc.  
 Smith & Pepper (on behalf of over 150 CATV systems)  
 Snyder & Associates  
 Springfield Television Broadcasting Corp.  
 Storer Broadcasting Co.  
 Superior Broadcasting Corp.  
 Taft Broadcasting Co.  
 Telarama, Inc.  
 Triangle Publications, Inc.  
 Tri-State TV Translator Association  
 Trans Video Corp.  
 TV Cable Service of Abilene, Inc.  
 U.S. Independent Telephone Association  
 West Central Broadcasting Co.  
 Westinghouse Broadcasting Co., Inc.  
 Western Slope Broadcasting Co., Inc.  
 WGAL Television, Inc.  
 WJAC, Inc.  
 WKBH Television, Inc.  
 WTVY, Inc.  
 William L. Fox

## APPENDIX B

## SUMMARY OF COMMENTS ON PARAGRAPH 50

National Community Television Association (NCTA) urges that a rule along the lines of the policy adopted in paragraph 49 and proposed in paragraph 50 "completely arbitrary," "unnecessary," and "would be a virtual prohibition provide CATV service in such communities (NCTA comments, pp. 13-14). By way of support NCTA quotes at length (NCTA, exhibit B, pp. 14-22) from the discussion in the Seiden report concerning "CATV in Three Station Market" (pp. 84-86) and from the Fisher report concerning the effect of noncarrier on audience and revenues where there are three or more off-the-air program alternatives (pp. 91-92). NCTA states that the Seiden and Fisher conclusion "show conclusively that there is absolutely no basis for allegations of CAT as an adverse factor in the potential development of UHF television in large cities" (NCTA, exhibit B, pp. 22, 32). NCTA asserts further that there is "no criterion for determining whether a CATV system might at some time have the effect of delaying construction of a UHF station in a three-station market (NCTA comments, p. 14, exhibit B, p. 31). Finally, it states that the existence of a CATV system in a community has not in the past prevented construction of a successful VHF or UHF television station in the community (ibid.).

Other comments on behalf of CATV interests challenge the proposed paragraph 50 rule principally on the ground of alleged lack of jurisdiction over CATV systems. It is asserted in addition that CATV will help UHF by providing good quality reception to an immediate audience prior to all-channel set saturation. Because of this, some UHF permittees in major cities have indicated no objection to CATV entry. It is further asserted that the success of independents will ultimately depend on their ability to provide a program service which will attract viewers and advertisers. International Telemeter Corp. states that if and when CATV systems are established on a broad base in large metropolitan areas, they may well be utilized for pay-TV operations as an adjunct to other forms of wire television (Telemeter reply comments, p. 11). But, Telemeter adds (ibid.), "this is not to say that the public interest will not be served by the result \* \* \* The multiplicity of services via wire television systems can only serve, not harm the public interest."



The comments of the American Broadcasting Co. (ABC) support the proposal. ABC states that a CATV operator in a market such as Philadelphia could carry on several New York independents to the very serious detriment of the local Philadelphia UHF stations, and that the carriage and nonduplication rules recently adopted by the Commission are not truly responsive to the "unexpected actualization of the audience interested in independent programming." ABC therefore believes that the Commission should "establish the areas or zones" normally to be served by television stations and delineate the circumstances under which a station's signals may properly be brought to areas not within its normal service area. It asserts that interim rules, pending the adoption of final rules in part II, are needed because once CATV systems are established in markets that have a potential for independent UHF station development in the reasonably near future, the Commission will find itself in the impossible position of trying to undo what has already been done—of possibly adopting a regulation which would deny to substantial numbers the service which they assumed they could receive and for which they have already paid. ABC therefore urges the adoption of a rule prohibiting any person from transporting the signal of a TV station beyond its grade B contour into a community within the range of four or more commercial grade A assignments and receiving grade A or better service from three or more commercial TV stations (or two such stations with a third station already authorized). ABC states that such a rule would apply especially to all but three of the Nation's top 100 markets and therefore to those areas which now or shortly will have three or more local network services and the reasonably immediate likelihood of a fourth commercial service; that with this amount of service, these areas do not have any pressing need for additional service via wire, and they are also the areas which hold the most possibilities for UHF development; that the interim procedure would insure that a significant pay-TV service would not be established while the Commission is reaching its final decision in this proceeding and in the pay-TV rulemaking proceeding that has recently been requested; and that at the same time, the interim procedure will not preclude the development of CATV in these relatively underserved areas where it serves as a needed adjunct to free television service. Above all, ABC stresses that the proposed rule will prevent the establishment of CATV systems in areas and under conditions which the Commission may ultimately conclude would inhibit or prevent the normal development of UHF television.

Westinghouse in its comments takes a position similar to that of ABC. It urges a restriction upon the importation of signals into communities situated within the grade A coverage of four or more commercial TV assignments and communities within the grade A coverage of three or more commercial stations actually in operation (with exceptions (i) for two station markets with an outstanding construction permit for a third station where such permit is not activated within 6 months, and (ii) to areas within the grade A coverage of three stations not receiving the full service of the three networks because of the existing network affiliation relations). It asserts that many applicants for CATV franchises in big cities today are promising to deliver such stations as WOR-TV and WNEW-TV, New York, and WGN-TV, Chicago; that these are well-established, independent stations in major markets, and, compared with a UHF station just getting started in another city, have a much greater economic base to make major expenditures for programming; and that the local UHF station, competing with these major stations for what is at best a limited audience (i.e. the audience for nonnetwork programming), will be unable to get a large enough share of this audience necessary for it to produce the income needed for the station to buy programming with which it can *in fact* compete for viewers with the other stations on the system. It states that CATV only brings its service to some viewers—those fortunate enough to live in areas with a large enough local population to furnish an economic base for the laying of CATV cable, and then only those living in such areas who can afford to pay CATV fees. Westinghouse asserts that CATV in big cities also has the obvious potential of transforming itself into pay-TV, and points to recent news reports that tell of a company which was unsuccessful in its efforts to operate a pay-TV system in one city in Canada and is now planning to take over a successful major CATV system in another Canadian city and convert it to pay-TV in whole or in part. Finally, Westinghouse stresses the need for an interim rule, stating that once CATV franchises are granted in the larger markets and construction of the systems



is commenced pursuant to those grants, the Commission, from a practical and political viewpoint, will have lost effective control of the situation in those areas.

Storer Broadcasting Co. also supported the proposal because, it asserts, there is a definite probability of serious impact on television development in such cases, and the Commission cannot, through inaction, permit events to occur which jeopardize the goals set by the Congress and the Commission looking toward a competitive nationwide system of intermixed local television facilities. It urges that there is an established immediate need to "hold the line," during the interim period, on importation of distant signals to the major markets where CATV's "present stampede" into these markets might destroy the independent stations' audience potential "through importation of competitive programming on unequal terms" (Storer comments, p. 12). Storer also states that if the policy is to be effective, it should be applied to affiliated as well as independent UHF stations, and that it should be extended to CATV systems in nearby communities upon which the UHF depend for audience circulation. It asserts that a UHF station, although nominally a network affiliate, may still rely largely on independent programming, and that therefore its development requires the same protection as that proposed for independent UHF operators; and that CATV systems in nearby communities "can impose drastic damage on that station's audience circulation, particularly on a cumulative basis." (Id. at p. 14.)

The Association of Maximum Service Telecasters (AMST), Midwest Television, Inc. (Midwest), and the joint comments of KHOU-TV, KUTV, KXTX, WANE-TV, WAVF-TV, WFLE-TV, WIRV, WJXT, WMT-TV, WNOK-TV, WTOP-TV (joint comments) all urge the adoption of interim procedures going beyond those proposed in paragraph 50. The factual basis of AMST's and Midwest's comments have been described in part (see pars. 31-41). In addition, AMST cites the experiences of the UHF station in Lock Haven, Pa., and of UHF station WRLP, Greenfield, Mass., in the face of CATV competition. AMST asserts that the importation of outside large city independent television stations by CATV will be an obstacle to the development of a fourth network since it will jeopardize the development of the UHF stations in these cities. AMST also states that the entry of CATV into larger cities poses a substantial threat to the development of network UHF service, citing in support statement made to the Commission or to the Congress of Rust Craft Broadcasting Co. (permittee of WJKS-TV, Jacksonville, Fla., and WCCB-TV, a new UHF station in Charlotte, N.C.). Midwest describes the explosive growth of CATV in the Peoria-La Salle area, the Springfield area, the Champaign-Danville area, the WCIA service area generally, and the San Diego area (see pars. 34, 39-41). The joint comments assert that proposals to bring multiple distant signals into areas such as Fort Wayne, Ind., Columbia, S.C., Jacksonville, Fla., and Indianapolis, Ind., jeopardize or foreclose the development of new UHF stations in these areas. The joint comments point out that in the area served by the existing Sacramento-Stockton stations, CATV systems have been franchised or have commenced operations in at least 31 communities, and applications for franchises have been filed or proposed in at least 18 more—including Sacramento and Stockton themselves; that the total number of households in these cities and communities is more than 250,000, representing a major portion of the audience now served by the three existing Sacramento-Stockton commercial stations and a still more substantial portion of the audience which would be served by KPXL, the newly authorized UHF station on channel 29 in Sacramento; that as the permittee for the new UHF station in Sacramento has informed the Sacramento City Council, the importation of outside signals from San Francisco-Oakland and Los Angeles stations, as proposed, would make it impossible for the new UHF station to survive.

AMST, Midwest, and the joint comments propose the interim rule that no CATV system shall be permitted to extend the signal of any television broadcast station beyond its grade B contour except upon a clear and full showing (a) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected to receive in the future, direct off-the-air local or area television service; and (b) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service.

in the area. AMST urges that the foregoing rule should be made effective immediately upon its publication and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's first report and order and its notice of inquiry and notice of proposed rule-making. It states that an alternative but much less satisfactory approach in review of the CATV activity since April 23 would be to apply the interim rule, (a) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (b) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

In reply comments ABC and Westinghouse assert that their interim proposal would better serve the public interest because it has been designed to prohibit development of CATV in areas where it could adversely affect the overall public interest but not to prohibit its development where it could have little adverse effect upon the public interest and where there may well be a substantial public need for CATV services. In its reply, AMST asserts that its interim procedure would not have the effect of being a complete ban on CATV; that it would leave untouched the further expansion and development of CATV in its historic functions—(a) the providing of service to communities that are remote and isolated and do not have, and cannot be expected to receive in the future, a first off-the-air local or area television service, and (b) the providing of a full service, improving the off-the-air service of local and area television stations in pockets within their normal coverage contours where for terrain or similar reasons a desirable quality of service is not received. It further argues that, if there are indeed situations in which a CATV entrepreneur can show that it will aid rather than threaten the maintenance or expansion of existing UHF stations and the development of new UHF service, appropriate interim rules and policies will leave it open to the CATV entrepreneur to make such a showing. AMST urges that the ABC and Westinghouse interim procedure are inadequate because they seek at the most to protect only those communities or areas which would ultimately have four television stations; that even as to those communities or areas, three television stations must already be active or two must be active and the third imminent; and that the proposed rule would apply only in the case of A contours of those existing or imminent stations. AMST states that there is no reason *at least* in the interim to allow CATV to retard UHF development in *any* market. And that it is entirely possible for CATV systems in dozens of small communities to blanket most of the audience potential in each station's service area beyond its grade A contour; and that the area can thus be very effectively denied to a small UHF station—possibly the difference between survival and failure, and at least the difference between effective programming and ineffective programming.

## APPENDIX C

### COMMISSION'S MEMORANDUM ON ITS JURISDICTION AND AUTHORITY

Section 1 of the Communications Act (47 U.S.C. 151) states that the purpose of the act is the regulation of interstate and foreign commerce in communication by wire and radio, and that to efficiently achieve this purpose, authority over such commerce is centralized in the Commission. Section 2 (47 U.S.C. 152) states that the "provisions of this Act" shall apply to "all interstate communication by wire or radio \* \* \* and to all persons engaged within the United States in such communication \* \* \*". These terms are defined in section 3 of the act. Section 3(a) defines wire communication as the "transmission of \* \* \* pictures, or sounds of all kinds by aid of wire, cable, or other like connection between two points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission." Section 3(b) defines communication by radio as the "transmission by radio of \* \* \* pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

From the plain language of these definitions, there would seem to be no question but that CATV systems are engaged in interstate communications by wire or

radio. They transmit "pictures, and sounds \* \* \* by aid of wire" and "instrumentalities \* \* \* [used for] \* \* \* the receipt, forwarding, and delivery of communications \* \* \* incidental to such transmission," and hence fall within the definition of wire communication under section 3(a).<sup>1</sup> Moreover, CATV systems constitute interstate communication by wire, since they form a connecting link in the chain of communication between the point of origin (transmitting station) and reception by the viewing public (the CATV subscriber)—a chain which "is now well established \* \* \* as interstate communication." *Capital City Telephone Co.*, 3 FCC 189, 193 (citing *Federal Reserve Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266).<sup>2</sup> The law is clear that the mere location of communication facilities wholly within one State does not establish that the communication service rendered over such facilities is an intrastate service, and that a communications service can be interstate foreign in nature and subject to the Commission's jurisdiction even though the facilities are located within the confines of one State. *California Interst Telephone Company v. F.C.C.*, 328 F. 2d 556 (C.A.D.C.); *Ward v. Northern O Telephone Co.*, 400 F. 2d 816 (C.A. 6), cert. den. 371 U.S. 820; *Pacific Telephone, Inc.*, FCC 61 1180, 4 R.R. 2d 145 (1964). CATV systems are extensions of the interstate service of the television broadcast stations whose signals they carry. *Charlshorn Publishing Co. v. F.C.C.*, 225 F. 2d 511, 517 (C.A.D.C.); hence constitute "interstate communication by wire" to which the provisions of the act are applicable (secs. 2(a), 3(a)). See *American Trucking Association v. United States*, 344 U.S. 298, 311.<sup>3</sup>

With respect to the Commission's authority to adopt the rules proposed in notice of inquiry and proposed rulemaking, i.e., the "provisions of [the] act that are to be applied to CATV systems, there are the following sections: Sections 1, 4(i), 303 (f), (h), (p), and (r), 307(b), 315, 317, and 508. But the critical sections would appear to be 1, 307(b), 4(i), and 303 (f), (h), and (r). As the notice and the report and order in dockets Nos. 14895 and 15233 make clear, the existence and growth of CATV systems threaten to impede realization of the Commission's television assignment plan and policies under sections 1: 307(b) (i.e., the sixth report and order). See *Carter Mountain Transmiss Corp. v. F.C.C.*, 321 F. 2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963).<sup>4</sup> The Commission has authority under sections 4(i), 303(f), 303(h), and 303(r) to

- perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions (4(i));
- make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this act \* \* \* (303(f));
- establish areas or zones to be served by any station (303(h));
- make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this act \* \* \* (303(r)).<sup>5</sup>

The foregoing provisions (4(i), 303(f), 303(h), and 303(r)) give the Commission broad rulemaking authority to carry out the provisions of this act (6

<sup>1</sup> It can be argued that CATV systems, in receiving, forwarding, and delivering the third's signal to the viewing public, are the "instrumentalities incidental to the transmission of the signal," and hence fall within the definition of "communication by radio" in sec. 3. However, it is necessary to consider this argument in view of the discussion at, as to sec. 3(a) and the scope of the Commission's proposals. Since CATV operates chiefly by wire, sec. 3(a) is not applicable. A determination of their precise status is essential to the question of the Commission's jurisdiction to proceed as proposed in notice of inquiry and proposed rulemaking.

<sup>2</sup> Congressional approval of the *Capital City* doctrine was expressed in connection with the 1960 amendment to sec. 202(b). See 105 Congressional Record at 6256.

<sup>3</sup> It is well understood, significant that in sustaining the jurisdiction of the Interstate Commerce Commission in *American Trucking* the Supreme Court relied solely upon provisions of the Motor Carrier Act that are, in the circumstances, analogous to secs. 2 and 3 of Communications Act. Compare 40 U.S.C. 202(a) and 303(a)(19) with 47 U.S.C. 152-153 (a) and (b).

<sup>4</sup> In addition, as noted in the notice, there exists the potential to frustrate the purpose of the act embodied in secs. 303(a), 319, 315, 317, and 508 (and certain Commission regulations).

<sup>5</sup> Secs. 303 (f), (h), and (r) are preceded by the following clause:

"Except as otherwise provided in this act the Commission from time to time, as public convenience, interest, or necessity requires shall \* \* \*."

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es. 1 and 307(b)) with respect to communications or persons coming within the Commission's jurisdiction (including CATV—sec. 2(a)). Section 303(h), particular, was affirmatively designed to assist the Commission in effectuating a fair and equitable distribution of broadcast service called for by section 307(b).<sup>9</sup> The Commission's authority to issue rules establishing the area or zone to be served by any station for this purpose includes the power to prevent infringement of the rules by "any person" (secs. 312(b) and 502 of the Communications Act). Hence, it clearly encompasses, we believe, the authority to prescribe by rule the conditions under which the station's signal may be extended beyond the area or zone to be served by the originating station, by means of CATV—an "interstate communication by wire" to which the act's provisions are applicable (secs. 2(a) and 3(a)).

Moreover, apart from section 303(h), the general rulemaking power of the Commission (secs. 4(i) and 303(r)) includes authority to take necessary action, inconsistent with the act or law, to prevent frustration of section 307(b) by CATV. In *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 215-220, the Supreme Court citing, *inter alia*, sections 1, 303(f), and 303(r), stated that:

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio \* \* \*. In the context of the developing problems to which it was directed, the act gave the Commission not niggardly but expansive powers.

Under such "expansive" and "comprehensive" powers, the Commission has authority to take reasonable and appropriate action, including promulgation of rules, "as may be necessary" to carry out the provisions of section 307(b)—to insure that the regulatory scheme embodied in that section (the equitable distribution of service) and section 303 is not frustrated by the operation of CATV, an "interstate communication by wire" to which the act's provisions are applicable. This authority does not depend on a specific reference to CATV or CATV practices in the act. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203. See also, *National Broadcasting Co. v. United States*, 319 U.S. 190, 218-219, where the Supreme Court stated:

True enough, the act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic \* \* \*. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purpose for which the Communications Act of 1934 was brought into being by attempting an itemized catalog of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.<sup>8</sup>

<sup>8</sup> Sec. 303(h) was copied from the Radio Act of 1927 and originated in preceding bills to amend the Radio Act of 1912. For the legislative intent, see hearings on H.R. 5589 before the House Committee on Merchant Marine and Fisheries, 69th Cong., 1st sess., pp. 40-41.

<sup>9</sup> See also, *Stahlman v. F.C.C.*, 126 F. 2d 124, 128 (C.A.D.C.). For the intended comprehensive scope of Commission authority see, e.g., the following legislative history of the Radio Act of 1927, which was reenacted in all substantial respects in the Communications Act of 1934 (78 Congressional Record 8822-8823, 10313-10314, 10990): 66 Congressional Record 5479; S. Rep. 772, 69th Cong., 1st sess., pp. 2, 3.

<sup>10</sup> The Court, in referring to provisions of the act such as secs. 303 (g) and (r), stated 319 U.S. at 217-218):

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the fuller and more effective use of radio in the public interest. We cannot find in the act such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. One station might dominate the other with the power of its

To the same effect in other fields, see *Houston, East and West Texas Railway Co. v. U.S.*, 234 U.S. 342; *U.S. v. Wrightwood Dairy Co.*, 315 U.S. 11; *U.S. v. Pennsylvania R. Co.*, 323 U.S. 612; *American Trucking Assoc. v. U.S.*, 344 U.S. 298; *Public Service Commission of State of New York v. Federal Power Commission*, 327 F. 2d 893, 897 (C.A.D.C.).

The *American Trucking* case is particularly pertinent. The Supreme Court there sustained ICC rules "aimed at conditions [trip-leasing] which may directly frustrate the success of the regulation undertaken by Congress." Affirming sections analogous to section 307(b) in our situation, the Court stated (344 U.S. at 311):

Included in the act as a duty of the Commission is that "to administer, execute, and enforce all provisions of this part, to make all necessary orders in connection therewith, and to prescribe rules, regulation, and procedure for such administration." And this necessary rulemaking power, coterminous with the scope of agency regulation itself, must extend to the "transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation" regulation of which is vested in the Commission by 202(a). See also 203(a) (19).

We point out that section 204(a) (6) of the Motor Carrier Act is substantially similar to sections 303(c) and 4(i) of the Communications Act; while in the circumstances, sections 202(a) and 203(a) (19) of that act are closely analogous to sections 2(b) and 3(a) of the act. Further, the Court reached its conclusion "despite the absence of specific reference to leasing practices in the act stating (at pp. 309-310):

Our function, however, does not stop with a section-by-section search for the phrase "regulation of leasing practices" among the literal words of the statutory provisions. As a matter of principle, we might agree with appellants' contentions if we thought it a reasonable canon of interpretation that the draftsmen of acts delegating agency powers, as a practical and realistic matter, can or do include specific consideration of every evil sought to be corrected. But no great acquaintance with practical affairs is required to know that such presence either in fact or in the minds of Congress, do not exist. *National Broadcasting Co. v. United States*, 319 U.S. 190, 212-220; \* \* \*. Its very absence, moreover, is precisely one of the reasons why regulatory agencies such as the Commission are created \* \* \*.

See also, *Public Service Comm. of N.Y. v. FPC*, 327 F. 2d 893, 896-97 (C.A.D.C.).

Of course, the rules must be "reasonably necessary and fairly appropriate" to the protection of the regulatory scheme. *Colorado Interstate Gas Co. v. Federal Power Commission*, 142 F. 2d 943, 952 (C.A. 10). See also, *American Trucking Assn. v. U.S.*, 344 U.S. at 314-315; *National Broadcasting Co. v. U.S.*, 319 U.S. at 219 ("Generalities unrelated to the living problems of radio communication cannot justify exercises of power by the Commission").<sup>16</sup> The report and order in dockets Nos. 14895 and 15233 demonstrates the appropriateness and necessity

of the signal. But the community could be deprived of good radio service in ways less obvious. One man, technically and technically qualified, might apply for and obtain the licenses both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the public. The language of the act does not withdraw such a situation from the regulatory and regulatory power of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses."

The *Public Service Commission* case sustained the power of the Federal Power Commission to issue temporary certificates to protect producers although sec. 7(c) of the Federal Power Act expressly authorized such action only to protect customers, on the basis of the broad provision of sec. 16 of that act which are virtually the same as sec. 303(c) of the Communications Act. The Court stated (327 F. 2d at 897): "All authority of the Commission need not be found in explicit language. Sec. 16 demonstrates a realization, Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation."

The Commission clearly has no jurisdiction over bowling alleys or theaters, for example, as an administrative agency has no greater power than has been conferred by Congress. *Stark v. Wickard*, 321 U.S. 288; *NLRB v. Atlantic Metallic Casket Co.*, 205 F. 2d 9 (C.A. 5). Cf. *Peters v. Hubbs*, 349 U.S. 331. However, unlike bowling alleys and theaters, CATV systems intercept and extend the signals of television stations, and thus have a uniquely close relationship to the regulatory scheme. Moreover, CATV systems are engaged in interstate communication by wire to which the act's provisions are expressly applicable.



rules requiring all CATVs to carry local stations without duplication for a reasonable period. Moreover, the *Carter Mountain* decision establishes the reasonableness of the requirements. In affirming the Commission, the Court stated that "this does not appear to us an unreasonable condition," but rather "a legitimate measure of protection for the local station and the public interest" (21 F. 2d 359, at 363-364). The notice of inquiry and proposed rulemaking similarly demonstrates the validity of the Commission's concern as to the effect of CATV on independent stations and programing sources, as well as on the development of UHF in the larger markets.

In conclusion, it would appear that under the broad regulatory powers vested in it by the Communications Act, the Commission presently has jurisdiction over CATV systems, whether microwave is used or not; that there are pertinent provisions of the act applicable to the exercise of authority over such systems (in particular, secs. 1, 4(i), 303(f), 303(h), 303(r), 307(b), and 403); and that the proposed rules and inquiry represent a reasonable exercise of that authority in the circumstances.

#### APPENDIX D

1. Part 21 is amended as follows:

2. In section 21.710, paragraphs (a) and (b) are amended and a new paragraph (i) is added as follows:

##### § 21.710 DEFINITIONS

As used in §§ 21.712 and 21.714:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include, (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to it; community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programing of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

\* \* \* \* \*

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

3. In section 21.712, paragraphs (b), (c), (d)(3), (e), (g), (h), (i), (j) amended: paragraphs (i)(4) and (k) are added; and note 2 to section 21.712 is deleted:

##### § 21.712 AUTHORIZATIONS FOR FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS \* \* \*

\* \* \* \* \*

(b) *Notification of request for service.* Any such CATV system or other subscriber proposing to utilize such service to relay television signals to any CATV system, either directly or indirectly, shall notify the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system operates or will operate in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the request for service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an

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unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local area, and State educational television agencies, if any. Such notice shall include the fact of the request for service, identification of each CATV system to utilize the service requested (either directly or indirectly), identification of the community served or to be served by each CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

(c) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the station operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part; and

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(d) *Exceptions.* \* \* \*

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by a translator.

(e) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade A or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(g) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program on against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (h) and (i) of this section.

(h) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of a broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of a broadcast to be deleted.

(i) *Exceptions.* Notwithstanding the requirements of paragraph (h) of this section,

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(j) *Disputes between television broadcast or translator stations and CATV systems; requests for waiver of the rules or for different treatment.* In the event that a dispute should arise, at any time, between a television broadcast or translator station and a CATV system served under an authorization subject to this section, on the question of whether the CATV system is complying with the applicable requirements, the matter may be referred to the Commission for a ruling pursuant to the provisions of § 74.1109 of this chapter, either by the licensee carrier, or by the station, or CATV system, with notice to the licensee carrier. Where a dispute has been referred to the Commission for a ruling or where a petition for waiver of the rules or for different requirements has been filed under § 74.1109 of this chapter, with notice to the licensee carrier, microwave service to the relevant subscriber shall not be commenced or terminated until 30 days after the Commission's ruling has been received by the licensee carrier.

(k) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

NOTE 1.—As used in § 21.712(b), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

II. Part 74 is amended as follows:

1. In section 74.1, paragraph (c) (4) is deleted, and two new paragraphs (d) and (e) are added to read as follows:

§ 74.1 SERVICES COVERED BY THIS PART

\* \* \* \* \*

(d) Community antenna relay stations (subpart J).

(e) Community antenna television systems (subpart K).

2. In section 74.1001(e), subparagraphs (1) and (2) are amended as follows and a new subparagraph (9) is added as follows:

§ 74.1001 DEFINITIONS

\* \* \* \* \*

(e) As used in §§ 74.1031 and 74.1033.

(1) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(2) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programming of a television broadcast station within that station's grade B contour shall be deemed an extension of the originating station.

\* \* \* \* \*

(9) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

3. Section 74.1031(c) is amended to read as follows:

§ 74.1031 ELIGIBILITY AND CONTENTS OF APPLICATION

\* \* \* \* \*



(c) An application for any authorization subject to § 74.1033 shall contain a statement that the applicant(s) have notified the licensee or permittee of any television station, within whose predicted grade B contour the CATV system(s) operate or will operate, in whole or in part, and the licensee or permittee of any 100 w or higher power translator station operating in the community of each such system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or permittees and educational interests. The notice shall include the fact of filing by the applicant(s), identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television, standard and broadcast, and FM station(s) whose programs will be distributed to each such CATV system.

NOTE 1. As used in § 74.1031(c), the term "predicted grade B contour" means the field intensity contour defined in § 73.683(c) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

4. In section 74.1033, paragraphs (a), (b) (3), (c), (e), and (f) are amended; paragraphs (g) (4) and (h) are added; and the note to section 74.1033 is deleted.

§ 74.1033. LICENSING REQUIREMENTS \* \* \*

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating or subsequently authorized and operating television broadcast and 100 w or higher power translator stations in the following order of priority, upon the request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations with whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations with whose grade B contour the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions* \* \* \*

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programming is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade- or higher priority contour it operates, or the signals of one or more 100- or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or with the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals

equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* \* \* \*

\* \* \* \* \*

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

A new subpart K is added to read as follows:

#### SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

##### Contents

- SEC. 74.1101 Definitions.
- SEC. 74.1103 Requirements relating to distribution of television signals by community antenna television systems.
- SEC. 74.1105 Notification prior to the commencement of new service.
- SEC. 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures.
- SEC. 74.1109 Procedures applicable to requests for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

#### SUBPART K—COMMUNITY ANTENNA TELEVISION SYSTEMS

##### § 74.1101 DEFINITIONS

(a) *Community antenna television system.* The term "community antenna television system" ("CATV system") means any facility which, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by one or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than 50 subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such an apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" mean any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television broadcast translator station as defined in § 74.701 of this chapter. A television translator station which is licensed to and rebroadcasts the programming of a television broadcast station within that station's grade B contour, shall be deemed an extension of the originating station.

(c) *Principal community contour.* The term "principal community contour" means the signal contour which a television station is required to place over its entire principal community by § 73.685(a) of this chapter.

(d) *Grade A and grade B contours.* The terms "grade A contour" and "grade B contour" mean the field intensity contours defined in § 73.683(a) of this chapter.



(e) *Network programing.* The term "network programing" means programing supplied by a national television network organization.

(f) *Substantially duplicated.* The term "substantially duplicated" means regularly duplicated by the network programing of one or more stations singly or collectively, in a normal week during the hours of 6 to 11 p. m. local time, for a total of 14 or more hours.

(g) *Priority.* The term "priority" means the priority among stations established in § 74.1103(a).

(h) *Independent station.* The term "independent station" means a television station which is not affiliated with any national television network organization.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade A contour of that station.

#### § 74.1103 REQUIREMENT RELATING TO DISTRIBUTION OF TELEVISION SIGNALS BY COMMUNITY ANTENNA TELEVISION SYSTEMS

No community antenna television system shall supply to its subscribers signals broadcast by one or more television stations, except in accordance with the following conditions:

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating stations subsequently authorized and operating television broadcast and 100 watt higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contours the system operates, in whole or in part;

(4) Fourth, all commercial and noncommercial educational television translator stations operating in the community of the system with 100 watt higher power.

(b) *Exceptions.* Notwithstanding the requirements of paragraph (a) of this section,

(1) The system need not carry the signal of any station, if (i) that station's network programing is substantially duplicated by one or more stations of higher priority, and (ii) carrying it would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station.

(2) In cases where (i) there are two or more signals of equal priority which substantially duplicate each other, and (ii) carrying all such signals would, because of limited channel capacity, prevent the system from carrying the signal of an independent commercial station or a noncommercial educational station, the system need not carry all such substantially duplicating signals, but may select among them to the extent necessary to preserve its ability to carry the signals of independent commercial or noncommercial educational stations.

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the system whose programing is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade A or higher priority contour it operates, or the signals of one or more 100 watt higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device which allow the subscriber to choose between cable and noncable reception, and the subscriber affirmatively indicates in writing that he does not desire such device.

(c) *Manner of carriage.* Where the signal of any station is required to be carried under this section,

(1) The signal shall be carried without material degradation in quality within the limitations imposed by the technical state of the art; ;

(2) The signal shall, upon request of the station licensee or permittee, be carried on the system on the channel on which the station is transmitting (where practicable without material degradation) ; and

(3) The signal shall, upon the request of the station licensee or permittee, be carried on the system on no more than one channel.

(d) *Stations entitled to program exclusivity.* Any such system which includes, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against any priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(e) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon the request of the station licensee or permittee, refrain from duplicating any program broadcast by such station, on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of its broadcast of the program and the date and time of its broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of the broadcast to be deleted.

(f) *Exceptions.* Notwithstanding the requirements of paragraph (e) of this section,

(1) The CATV system need not delete reception of a network program if, in doing, it would leave available for reception by subscribers, at any time, less than the programs of two networks (including those broadcast by stations whose signals are being carried and whose program exclusivity is being protected pursuant to the requirements of this section) ;

(2) The system need not delete reception of a network program which is scheduled by the network between the hours of 6 and 11 p.m., eastern time, if broadcast by the station requesting deletion, in whole or in part, outside of the period which would normally be considered prime time for network programming in the time zone involved ;

(3) The system need not delete reception of any program consisting of a broadcast coverage of a speech or other event as to which the time of transmission is of special significance, except where the program is being simultaneously broadcast by a station entitled to program exclusivity ; and

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

#### 105 NOTIFICATION PRIOR TO THE COMMENCEMENT OF NEW SERVICE

A CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the grade B contour of that station, unless the system has given prior notice of proposed new service to the licensee or permittee of any television broadcast station within whose predicted grade B contour the system operates or operates, and to the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within 60 days after obtaining a franchise or entering into a lease or other arrangement to use facilities ; in any event, no CATV system shall commence such operations until 30 days after notice has been given. Such notice shall be given by existing systems which propose to carry new distant signals at least 30 days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within 60 days after obtaining a franchise or entering into a lease or

other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least 30 days prior to commencement of service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assigned under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county in which the station will operate and the local, area, and State educational television agency, if any. The notice shall include the name and address of the station, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. When a petition with respect to the proposed service is filed with the Commission pursuant to § 74.1109 of this chapter, within 30 days after notice of the proposed service to subscribers shall not be commenced until after the Commission has ruled on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided*, however, that service shall not be commenced in violation of the terms of any specified temporary relief granted under the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within 30 days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1962.

NOTE 1.—As used in § 74.1105, the term "predicted grade B contour" means the intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

**§ 74.1107 REQUIREMENT FOR SHOWING IN EVIDENTIARY HEARING AND COMMISSION APPROVAL IN TOP 100 TELEVISION MARKETS; PROCEDURES**

(a) No CATV system operating within the predicted grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and that such extension is necessary for the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a CATV system in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The size of the market shall be determined by the rating of the American Research Bureau on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation and has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond the grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or comment within 30 days after such public notice. A reply to such response or statement may be filed within a 20-day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, and otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be consistent with the public interest, taking into account particular circumstances of the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall be applicable to any signals which were being supplied by a CATV system



its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date; provided, however, that any new franchise or amendment of an existing franchise after February 15, 1966, to create or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section; and provided further that no CATV system located in the 100 largest television markets, which was supplying to its subscribers on February 15, 1966, a signal carried beyond its grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the second report and order in dockets Nos. 95, 15233, and 15971, FCC 66-220, paragraphs 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. In the event that an evidentiary hearing is held on such a petition, the Commission may also consider, upon the basis of the pleadings before it, whether temporary relief pending the outcome of the hearing is needed for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

**§ 74.1109 PROCEDURES APPLICABLE TO PETITIONS FOR WAIVER OF THE RULES, ADDITIONAL OR DIFFERENT REQUIREMENTS AND RULINGS ON COMPLAINTS OR DISPUTES**

- (a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.
- (b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected by the relief requested in the petition should be granted.
- (c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.
- (2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the relief sought is a clarification or interpretation of the rules.
- (d) Interested persons may submit comments or opposition to the petition within 30 days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.
- (e) The petitioner may file a reply to the comments or oppositions within 10 days after their submission, which shall be served upon all persons who filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.
- (f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument.

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evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief shall be accorded to any party pending the hearing and the nature of any temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition for service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within 10 days and reply comments within 7 days thereafter. The Commission will expedite its consideration of the question of temporary relief.

### III. Part 91 is amended as follows:

1. In section 91.557, paragraphs (a) and (b) are amended to read as follows and a new paragraph (i) is added as follows:

#### § 91.557 DEFINITIONS

As used in §§ 91.559 and 91.561:

(a) *Community antenna television systems.* The term "community antenna television system" ("CATV system") means any facility, in whole or in part, receives directly or indirectly over the air and amplifies or otherwise modifies the signals transmitting programs broadcast by or more television stations and distributes such signals by wire or cable to subscribing members of the public who pay for such service, but such term shall not include (1) any such facility which serves fewer than fifty subscribers, or (2) any such facility which serves only the residents of one or more apartment dwellings under common ownership, control, or management, and commercial establishments located on the premises of such apartment house.

(b) *Television station; television broadcast station; television translator station.* The terms "television station" and "television broadcast station" means any television broadcasting station operating on a channel regularly assigned to its community by § 73.606 of this chapter. The term "television translator station" means a television translator station as defined in § 73.606 of this chapter. A television translator station which is licensed to rebroadcast the programming of a television broadcast station within the station's grade B contour, shall be deemed an extension of the originating station.

(i) *Distant signal.* The term "distant signal" means the signal of a television broadcast station which is extended or received beyond the grade B contour of that station.

2. In section 91.559, paragraphs (a), (b) (3), (c), (e), and (f) are amended; paragraphs (g) (4) and (h) are added; and the note to section 91.559 is deleted.

#### § 91.559 AUTHORIZATIONS FOR OPERATIONAL FIXED STATIONS TO RELAY TELEVISION SIGNALS TO CATV SYSTEMS \* \* \*

(a) *Stations required to be carried.* Within the limits of its channel capacity, any such CATV system shall carry the signals of operating stations subsequently authorized television broadcast and 100 w or higher power translator stations in the following order of priority, upon request of the licensee or permittee of the relevant station:

(1) First, all commercial and noncommercial educational stations within whose principal community contours the system operates, in whole or in part;

(2) Second, all commercial and noncommercial educational stations within whose grade A contours the system operates, in whole or in part;

(3) Third, all commercial and noncommercial educational stations within whose grade B contour the system operates, in whole or in part; and



(4) Fourth, all commercial and noncommercial educational translator stations operating in the community of the system with 100 w or higher power.

(b) *Exceptions.* \* \* \*

\* \* \* \* \*

(3) The system need not carry the signal of any television translator station if (i) the system is carrying the signal of the originating station, or (ii) the system is within the grade B or higher priority contour of a station carried on the cable whose programming is substantially duplicated by the translator.

(c) *Special requirements in the event of noncarriage.* Where the system does not carry the signals of one or more stations within whose grade B or higher priority contour it operates, or the signals of one or more 100 w or higher power translator stations located in its community, the system shall offer and maintain, for each subscriber, an adequate switching device to allow the subscriber to choose between cable and noncable reception, unless the subscriber affirmatively indicates in writing that he does not desire this device.

\* \* \* \* \*

(e) *Stations entitled to program exclusivity.* Any such system which operates, in whole or in part, within the grade B or higher priority contour of any commercial or noncommercial educational television station or within the community of a fourth priority television translator station, and which carries the signal of such station shall, upon request of the station licensee or permittee, maintain the station's exclusivity as a program outlet against lower priority or more distant duplicating signals, but not against signals of equal priority, in the manner and to the extent specified in paragraphs (f) and (g) of this section.

(f) *Program exclusivity; extent of protection.* Where a station is entitled to program exclusivity, the CATV system shall, upon request of the station licensee or permittee, refrain from duplicating any program broadcast by such station on the same day as its broadcast by the station, if the CATV operator has received notification from the requesting station of the date and time of any of its broadcast of the program and the date and time of any broadcast to be deleted, as soon as possible and in any event no later than 48 hours prior to the broadcast to be deleted. Upon request of the CATV system, such notice shall be given at least 8 days prior to the date of any broadcast to be deleted.

(g) *Exceptions.* \* \* \*

\* \* \* \* \*

(4) The system need not delete reception of any program which would be carried on the system in color but will be broadcast in black and white by the station requesting deletion.

(h) *Interim requirement.* No CATV system shall be provided with microwave service, either directly or indirectly, if the operation of such CATV system would be inconsistent with § 74.1107 of this chapter.

Section 91.561 is amended to read as follows:

#### 91.561 NOTIFICATION BY APPLICANT

An application for any authorization subject to § 91.559 shall contain statement that the applicant has notified the licensee or permittee of any television broadcast station, within whose predicted grade B contour the CATV system(s) served or to be served operate or will operate, and the licensee or permittee of any 100 w or higher power translator station operating in the community of the system, of the filing of the application. Where it is proposed to extend the signal of any noncommercial educational television station beyond its grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter, the notice shall also be served upon the superintendents of schools in the community and county and the local, area, and State educational television agencies, if any. Such statement of the applicant shall be supported by copies of the letters of notification directed to such licensees or

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RE.—Appendix C contains the pertinent rules as subsequently amended by Memorandum Opinion and Order released April 21, 1966 (31 F.R. 6313).]

permittees and educational interests. The notice shall include the fact intended filing by the applicant, identification of each CATV system served or to be served under the authorization sought, identification of the community served or to be served by each such CATV system, and the television station(s) whose programs will be distributed by each such CATV system.

NOTE. As used in § 91.561, the term "predicted grade B contour" means the intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

#### DISSENTING STATEMENT OF COMMISSIONER ROBERT T. BARTLE

I dissent from the action asserting jurisdiction over community antenna systems. In my opinion, the Communications Act does not now confer such jurisdiction and the Commission is without authority to promulgate these rules.

I believe that we should seek legislation to resolve the basic considerations in this matter. Since the real concern surrounding CATV appears to be its possible evolution into pay-TV, I propose an amendment of the Communications Act to preclude community antenna systems from distributing programs other than those received from transmissions of broadcast stations.

I am opposed to the rule's impediments on entry of community antenna systems into the top 100 markets, and specification of the grade B contour, rather than the grade A or lesser contour, as the benchmark for requiring carriage of local TV stations.

#### STATEMENT OF COMMISSIONER KENNETH A. COX, CONCURRING IN PART AND DISSENTING IN PART

I concur in the steps the majority has taken, but must dissent to its failure to take other measures which I believe to be critically important. I think we are, indeed, at a crossroads in the development of our television system—and I gravely fear that the majority has taken a wrong turn.

The Commission has had a sorry record with respect to CATV. In the early 1950's when questions were first raised about CATV, the Commission's staff recommended that the agency assert and exercise jurisdiction over this new phenomenon.<sup>1</sup> However, the Commission of that day, not recognizing the potential impact of widespread CATV development, procrastinated and finally declined to assert general jurisdiction. At first, the consequences of that decision were hardly readily apparent—and were largely confined to small television markets where CATV, in most cases, performed its true supplemental function. Later the impact of CATV competition assumed more serious proportions, and the Commission began to shake off its inertia. In the *Carter Mountain* case<sup>2</sup> it denied an application for microwave facilities to serve CATV systems in Wyoming on the ground that the increased competition to a small market television station which would have resulted might have impaired its ability to continue to serve its audience. It indicated that it would grant applications on conditions designed to protect the station by requiring

<sup>1</sup> See Television Inquiry, hearings before the Committee on Interstate and Foreign Commerce, U.S. Senate, 85th Cong., 1st Sess., pt. 6, p. 3490 et seq.

<sup>2</sup> *Carter Mountain Transmission Corp. v. Federal Communications Commission*, 171 F.2d 359 (C.A.D.C.), cert. den. 375 U.S. 951 (1963).

the CATV systems carry the local station without degradation of signal and without duplicating its programs.

When last April, after more than 2 years of consideration of numerous comments and special studies by the Commission and the broadcast and CATV industries, we adopted minimal rules with respect to microwave-fed CATV systems and proposed to extend them to the air systems as well. It seemed to me—as I'm sure it did to broadcasters who had become increasingly alarmed by the explosive growth of CATV and its extension into larger and well-served markets—that the Commission had finally taken hold of the problem, 14 years late, but in time to prevent serious damage to the fabric of our television service. The Commission was divided four to two, but the majority, after considering and carefully laying out the unfair competitive impact of noncarriage of local stations or duplication of their programs, adopted rules which I think would have gone far toward preserving the system so painfully developed in this country—and promoting its further growth in the UHF. These rules would neither have destroyed existing CATV systems, nor deprived their subscribers of any programs. Similarly, they would not have blocked all future CATV development, but would simply have moved toward insuring that cable systems perform the valuable supplemental service for which they were originally devised. A reading of our first report and order in Docket Nos. 14895 and 15233, 38 F.C.C. 683, with its careful analysis of competition between broadcast stations and CATV systems—with particular emphasis upon the program exclusivity obtained in the market by broadcasters and its importance to their operations—gives the clear impression that the majority was concerned first and foremost with the preservation and expansion of our over-the-air television system. While it recognized the important service CATV systems can supply to their subscribers, it insisted that CATV was secondary and subordinate in rank, and should therefore be subjected to quite the strictest restrictions to favor the primary service.

At this time, less than a year later, the tone is different. In the report and order now issued—and even more in the deliberations leading up to the decisions reflected there—there has been a shift in emphasis. There is a subtly heightened importance assigned to the diversity of service which cable systems provide to *some* television homes, with a corresponding depreciation of the local service of area stations. There are expressions of concern that we not block the "new" technology of wired television—though the alternative of wired versus broadcast distribution has long been with us, both in radio and television, and it seems to me that CATV's technology, like its program service, is derivative and much less exciting in its possibilities than the over-the-air mode. And there is a tendency to downgrade program exclusivity—which seemed so important last April—and to forget the unfair competitive impact on broadcast operations of the CATV

indicated below. I think this is largely due to the vociferous protests, instigated by publicizing publicity efforts of certain elements of the CATV industry, of these cable subscribers. While they are a small percentage of the television homes in this country—and a minority even in the television markets where they are concentrated—they are numerous enough to have flooded Congress and the Commission with protests against rules which they were told we were about to take, but which were always exaggerated and in many cases completely false.



practices which we then undertook to regulate. The shift is obvious in the reduction in the degree of nonduplication protection which is now to be afforded local broadcasters.

Why this change in attitude? I suppose it could be argued that colleagues who now feel that same-day nonduplication is more in public interest than the 15 days before and after local broadcast which we specified last April were simply uninformed when they took that action, and therefore made a mistake. They do not advance explanation, and I am sure it was not true. In fact, they gave more careful attention to consideration of the details of broadcast CATV operation last year than they did on this round of discussion.

It would be more normal for such a change in position to be explained in terms of new information which has come to our attention for the first time since our action of last year. This may be the case for what I regard as drastic impairment of the protection which then decided should be given to the exclusive program rights a broadcaster has acquired in the program market—but, if so, it has not been explained to me in these terms. I cannot claim that I read all the comments in this voluminous proceeding, but in the time I was able to examine—drawn from both broadcaster and CATV comments—and in the analysis of all the major comments prepared by staff, I find no new factual data, and no new arguments, bearing on this issue which satisfactorily explain or justify the abandonment of the 15-day standard previously adopted. And, as suggested above, none of my colleagues have marshaled arguments which they have drawn from the comments to rationalize this new approach. Instead, they talk vaguely of balancing interests and minimizing disruption to the subscribers of existing systems not yet subject to the rules, and of the importance of making network programs available to these subscribers on the day they are presented by the networks. If that of these considerations is so important it seems strange to me that in 10 years we have knowingly permitted television stations to delay network programs for the far more numerous over-the-air and cable subscribers. Why has no one ever proposed a rule to prohibit this nefarious practice!

The fact is, of course, that except for certain live programs having an element of timeliness—all of which were excluded from the benefit of delayed nonduplication, and are almost never delayed in practice—there is no real urgency about seeing a particular program on a particular day or at a particular time. There may be an element of convenience, but it is one of the disadvantages of the television medium that the viewer must try to adjust his schedule to fit the times somewhere—at a network or a local station—has selected for the presentation of his favorite programs, and can change at will. It is important that as many network programs as possible be made available in the market. But as I shall point out below, the nonduplication rule now adopted seems to me to be based on the concept that it is better for the cable subscribers, who are a minority, to be able to see every network show on its day of origination than that they be furnished every network show, but with some of them delayed for a short period in order to make more of the most popular shows available to *everyone* in the market, nonsubscriber and subscriber alike.

would like to discuss in detail the discussion, in the first report in order in the microwave docket, of the period of nonduplication protection to be required, but time does not permit it. Certainly this is one of the longest and most carefully reasoned sections in the document, occupying nine pages in the printed report (see pars. 101-107). I find the explanation now offered for abandoning the result reached so insubstantial as to be shocking. Consider what the majority says in paragraphs 51 to 56. They start by saying that simultaneous nonduplication is clearly called for—which is hardly startling since even NCTA concedes this. It then notes that in the report we further determined that “some measure of protection and simultaneous nonduplication would also serve the public interest on a number of grounds.” I think that sets some sort of record for delicate understatement. After carefully considering the data accumulated in over 2 years, we explicitly found that *15-day* nonduplication, before and after local broadcast, was reasonably necessary to achieve fair competition and preserve the local broadcasters’ hard-won program exclusivity.

Now the majority say they have reconsidered and made a different choice, “in light of the fact that the rules are now being made applicable to a large number of existing systems and will affect their existing service to the CATV viewing public.” Well, that was certainly roughly understood in April 1965, when we proposed to extend microwave rules to the off-the-air systems, and to apply them to microwave service being provided under grants made prior to December 1963. That was the object of the exercise! Why the sudden announcement—as if discovered for the first time—that compliance with the rules “would tend to substantially disrupt the viewing habits of the CATV subscribers.” While I don’t think the “disruption” is great as is suggested, and am satisfied that the subscribers would become accustomed to the new schedules, certainly we knew a year ago that *some* change would be effected by the rules—otherwise why bother of adopting them. All we have learned since then is that, by the application of some misleading publicity techniques, seven hundred thousand subscribers were frightened into sending protest—usually form letters or cards thoughtfully supplied by the TV operator—to the Commission or the Congress. While I am not anxious to face the wrath of an aroused public than anyone else, I think some hazard of that kind is involved in making judgments deemed to serve the overall public interest but which injure or offend a part of the public. Furthermore, I think it could be demonstrated to the people concerned that their fears were exaggerated—that in a rather short time they would adjust to the few scheduling changes which would actually be involved.

In other words, I agree that we should avoid *unnecessary* disruption of established viewing habits, but not that we should do so “as much as possible”—which to the majority apparently means that such conformity established, if fleeting, habits of a very small part of the television audience should shape national television policy, not just them but for all future subscribers of all future systems as well. The majority says it seeks to preserve “the valuable public contribu-



tion of CATV in providing wider access to nationwide program. I agree that far, but not that there is any necessity for insuring wider selection of programs on any particular day for a favored when I believe it will deprive others of the opportunity, otherwise available, to see certain programs at all. The basic objective of permitting CATV systems to provide greater access to network programs can be fully achieved, as was pointed out in the first report, by 15-day nonduplication.

The majority then blandly announces that "balancing all the pertinent considerations," they think nonduplication should be cut to the same day for existing systems. I don't know what they balance since all they have discussed is the danger that some CATV subscribers—certainly not all of them—would have been required to drop some network programs—certainly not all of them—at the times they are broadcast by the local station or stations rather than at the times the cable system would otherwise have brought the programs in from distant stations. The only argument then advanced in favor of the result is that it will eliminate the great bulk of delayed nonduplication requests, citing paragraph 125 of the first report. I think this is an argument for the opposite result! Paragraph 125 read as follows:

125. There remains the question of the precise extent of the restriction to be imposed upon nonsimultaneous duplication. After examining the question carefully, we believe that the 15-day before-and-after period proposed in our last notice should be adopted. In dealing with network programs, our sample week study shows that, of all the hours of delayed network broadcasts, 10.2 percent were delayed less than 1 day, 48.9 percent were delayed from 1 to 7 days, 30.2 percent were delayed 8 to 15 days, and 10.7 percent were delayed over 15 days. A more detailed distribution shows that the number of hours of delayed network broadcasts falls sharply at the end of a 7-day period of delay and once again at the end of a 15-day period.

Thus our study showed that 79.1 percent of delayed network broadcasts were delayed from 1 to 15 days, and this was used as a principal justification for the 15-day protection adopted. Now it is argued that reducing the protection to the same day is good because it avoids dealing with the problem the rule was designed to handle in the first place. The majority notes, "as an incidental benefit," that this will also substantially reduce the areas of possible dispute between broadcasters and CATVs in complying with the rules." Quite so—but this is achieved by cutting the heart out of this part of the rules and reducing the rights of the broadcasters to such a low level that their opportunities for causing "disputes" are very slight. What seems odd to me is that we achieve this happy accommodation by favoring the party in this prospective "dispute" whom the first report found to be engaged in unfair competition in the area of program duplication, to the advantage of the party whose program rights the rules were designed to protect.

The majority then concedes that its concern about disruption of the result of 15-day nonduplication would not apply to new systems coming into service hereafter. Thus even if we must defer to the private interests of a relatively few people in not having their viewing habits disrupted, it is clear that the more effective protection called for is

policy adopted in the first report could be applied to new systems since their subscribers would have no established viewing patterns. But the majority does not even adhere to policy in this partial fashion. They say that even here there would be disruption because the subscriber may not be able to view programs from distant stations at the times specified in his TV guide. They are so solicitous of the future subscriber that, again, they completely overlook the interests of the nonsubscriber. What about the "disruption" suffered by the resident of a sparsely settled area who has no cable service, or the urban viewer who can't afford such service, and who read in this same unspecified TV guide<sup>4</sup> of programs carried on distant stations on the cable but which are not available to them on the local station(s), though they could have been if the local broadcaster's first-run rights had been adequately protected? There has been a lot of talk that the Commission's regulation of CATV operations would make second class citizens of cable viewers. It seems to me that the majority has gone overboard in the other direction by shaping policy to accord a ridiculous degree of importance to these people's assumed interests. It's hard for me to sympathize for the cable subscriber who is going to receive more stations—though probably no more real services—than the people of New York City but who, we are now told, must not only have this wealth of program choice but must also have every program available to him the same day it is made available to viewers in New York.

I would like to expand upon the impact I think this curtailed protection will have on the nonsubscriber. In one- and two-station markets the local broadcaster tries to put together the best possible schedule for his viewers, drawing on more than one network. Since conflicts are almost inevitable between the more popular programs of the competing networks, this has customarily meant that most of the programs are presented at the time of network feed, if the station is interconnected, but some are broadcast on a delayed basis. While some CATV interests have sought to denigrate this practice by calling it "cherry picking," it seems clear to me that it has served—and would continue to serve—the public interest by making available in markets with less than three stations the best of the offerings of all three networks. And delayed broadcasting serves the public even in a three-station market, permitting the local affiliate to rearrange the network schedule, to the limited degree his network and its advertisers will permit, in order to present a service which he thinks is more in the interest of his local audience. I think such local flexibility is in the public interest and should be preserved. A couple of years ago the Commission abolished nonduplication time and struck down CBS's incentive compensation plan because, in part, they impaired the local station's independence in reaching decisions as to clearance for programs offered it by its network. I think the clear result of the restricted nonduplication protection now being afforded will be to impel every station located in a three-station market and carried on CATV systems serving a substantial percentage of its audience to clear live for all the network shows it plans to pre-

<sup>4</sup> Certainly if 15 day protection were afforded the CATV operator would not publicize daily any programs he could be required to delete, but would tell his subscribers when they could watch the programs on the cable on the local station.

sent. I do not think this straightjacketing of the local broadcaster is desirable.

I think the impact will be even greater in markets with one or two stations. To the extent they now delay network programs—which 15-day nonduplication was specifically designed to protect—I think such stations have been providing a service to their audiences. I think they will now be sharply restricted in their ability to continue this service if not totally precluded from doing so. As long as only a small part of their audience is served by cable systems, they can probably continue to present programs on a delayed basis even though some of the potential viewers will have seen the program a short time earlier. If and when cable subscribers become a really significant factor in the market—and such operations are expanding at a rapid pace—then the broadcaster will not, I think, be able to continue to present programs selected from more than one network. It will be difficult enough to compete with the current offerings of a substantial number of distant stations—probably located in a larger market—without trying to do so with a program which a third, a half, or more of the local station's audience have already had an opportunity to watch. The majority in paragraph 51, tries to shore up its argument about "disruption" to new systems by saying that it is because of such concerns that such broadcasters, although entitled to 15-day protection, have requested only simultaneous nonduplication. In paragraph 116 of the first report we stated that NCTA had shown "a few instances" of such concessions by broadcasters, but did not regard this as of decisional importance. In the cases I know of where broadcasters who were entitled to *no* protection under the rules were able to bargain for simultaneous nonduplication, the result has been that they present delayed programs, or at most one or two.

The majority seeks to support its refusal to give greater nonduplication protection as to new CATV systems by arguing that it is obviously preferable to have one set of rules for all systems. Of course I would prefer that, too, though I think the single rule should provide for 15-day protection. But we quite often adopt tightened rules which we bear harshly on existing operations, and in most cases we handle the problem by grandfathering the situations which have already developed and applying the new rule prospectively. That is exactly what we could do here—and should do since my colleagues are unwilling to inconvenience the subscribers of existing cable systems. This is a common governmental practice, and often involves much more substantial discriminations than would be the case here.

The majority then turns to the question whether it should require 15-day nonduplication protection for nonnetwork programming. It decides not to do so for the surprising reason that it afforded minimum protection at best. In other words, having given very restricted nonduplication protection to nonnetwork programs out of concern for CATV systems (see par. 123, first report), the Commission now withdraws even that effort to insure the local station of a small fraction of the program exclusivity for which it has bargained. Why, then, do we make this provision last April, when we knew as much about the aspect of the matter as we do now? I agree that 15 days is no enough.



and am satisfied that we will do serious damage to the present method of program distribution unless we give the broadcaster at least protection of his right to be the first to present each program he purchases for his market. The majority says it has determined that we must look elsewhere if we are to achieve effective relief in this respect. This refers to some extension of the concept of permission to rebroadcast to cable operations. I think that this requires legislation, which may take a long time—and in any event I do not think it will necessarily provide the protection the majority seems to be seeking—though not very aggressively. The legislative proposal we have submitted to Congress calls attention to the problem but makes no specific recommendation. In paragraph 152(iii) the majority concedes that they are not in a position to state whether a section 325(a) approach would be effective and fully consistent with the public interest. That being the case, I do not think they are in a position to abandon the only protection now given the broadcaster—minimal though it is.

The majority drops an interesting footnote to paragraph 55, in which it says that same-day nonduplication affords "substantial" protection to the most popular network programming so that "*most* network affiliated stations should be viable." [Emphasis supplied.] It must be encouraging to broadcasters faced with serious and growing CATV competition to know that the majority thinks that not too many of them will go under—with loss not only to the businessmen concerned, but also to the local audiences they serve.

In paragraph 56 the majority concedes that conflicting public considerations are presented—though they have carefully avoided mentioning a single factor favoring retention of 15 day protection—and include that their resolution constitutes a fair compromise. I fail to see much evidence of this alleged balancing of competing interests. It seems to me that zeal to avoid at all costs any disruption to existing cable subscribers has carried the day. I don't think this matter was fully in issue at this stage of the proceeding. We did indicate that we wanted comments as to policy with respect to duplication of programs broadcast by the local station in black and white but available in color on a distant station on the cable. The parties duly addressed themselves to this question. But as to the extent of nonduplication protection, I think the general understanding was that we had reached a careful decision of this issue last April in adopting the microwave rules, and that if we adhered to our tentative conclusion as to jurisdiction over all CATV, there would be no change in this provision of the rules unless (1) experience with the microwave rules uncovered flaws, (2) someone demonstrated that off-the-air systems are so different that these rules could not appropriately be carried over to them. I know of no evidence of the former, and no one seriously tried to establish the latter—not even the NCTA, which simply incorporated the arguments it made to Congress last May in an effort to show that certain stations had prospered without delayed nonduplication.

But without any such showing of a need for change in the comments made in the proceeding, the majority has abandoned the position it developed so carefully last year. I suppose this simply proves the power of the pen when wielded by thousands of indignant members

of the public—even when they have been intentionally misled in writing in the first place. I think this provides an interesting—though rather depressing—chapter for students of the administrative process.

I agree that same-day nonduplication takes care of the time zone differential problem, but that's about all that it does over and above simultaneous nonduplication which NCTA was willing to concede months ago. The majority says it will afford the station affiliated with more than one network "some leeway" in presenting the most attractive programs of each, but then indicates just how much leeway the broadcaster has by reminding him that he must present it the same day the network did and that prime-time programs must be broadcast entirely within prime time. It may be that he can shoehorn in a few programs on this basis, though I believe it will require some change in policy by some of the networks—and will certainly involve additional expense for the station. Thus if it has been delaying network programs through the use of film, it would have to buy a videotape machine—and that's no small expense item, especially if he has to be able to handle color in order to be entitled to protection. Further, unless the network in question provides him an advance feed, he will have to have two loops into his studio, one for the live broadcast going out over the air and the other to feed the tape machine with a program coming in at the same time from another network. Since one- and two-station markets are usually small, this may pose serious problems for the broadcaster, and he may simply throw up his hands and cancel the full schedule of a single network to avoid trouble and expense. If he does, the public will lose by it—and so will he, in terms of lower average audience. I much prefer the greater flexibility permitted by the 15-day rule, and do not think the majority has even addressed themselves to this problem—much less assured themselves that what they speak of is feasible.

The majority inserts another footnote at this point, noting that the amount of delayed network broadcasting in the median one- or two-station markets is about 5½ hours and 11 hours per week, respectively. They cite paragraph 108 of the first report, which also shows that in one-station markets the range was from 1½ to 23½ hours, and in two-station markets, from 1 to 42½ hours. So when they concede that the median is not insignificant and that there will be some detriment to the public if the local station curtails delayed broadcasts, they may also recognize that for half the markets involved (84 one-station and 11 two-station) the impact will be more severe. Nonetheless, they console themselves with the thought that the amount of delayed broadcasting is not too large in the median market. But what puzzles me is that it was an unwillingness to "disrupt" established viewing patterns as to these very same programs which led them to cut back on nonduplication protection. If they worry about showing these 5½ or 11 hours of programming at later times to CATV subscribers, why are they so nonchalant about the risk that the equal, or greater, number of nonsubscribers now lose all, or a substantial part, of that programming? I would think that any sensible balancing of equities here would favor the nonsubscribers.



the other area of my disagreement with the majority concerns their treatment of the major market, distant stations issue. Since they will do no more, I support what they have done. However, I would have preferred a broader rule—which I am sure that would be easier to administer than the policy of multiple petitions, waiver requests, and findings to which we are now committed.

Certain of the broadcast entities filing comments in this proceeding urged us to exercise our authority under section 303(h) of the act to "establish areas or zones to be served by any stations." It was obviously suggested that this be done by limiting CATV systems to a mileage of stations providing a specified signal over the communities in which they are located, or by specifying a maximum mileage beyond which no station's signal should be extended. This is clearly a respect of our responsibility for allocations—an area in which even critics of the Commission concede our authority, and in fact recognize that the agency was created primarily and specifically for this purpose. We have thus far exercised this authority in television by establishing a carefully designed table of channel allocations and by fixing maximum limits on heights and powers. While there are many situations in which deficiencies in service can and should be corrected by supplemental means such as CATV, satellites, and translators, I do not believe that any of these auxiliary services should be permitted to disrupt the basic television system that Congress, the Commission, and broadcasters have worked so hard to establish.

It is precisely because one of these supplemental services, CATV, has taken a new and unexpected course that we are involved in this proceeding. I think its explosive development poses a threat of disruption to our television broadcast system, and that this is therefore the time to take hold of the problems presented and to fit cable operations into an appropriate place in the overall television structure. While the majority has undertaken to deal with part of these problems, I think it is not doing so in allocations terms and will, as a result, be unable to deal with the situation soundly, consistently, and expeditiously. The majority contents itself with saying that CATV entrepreneurs trying to bring distant signals—that is, signals carried beyond the originating stations' grade B contours—into the top 100 television markets will be required to demonstrate, in an evidentiary hearing, that they will not impair UHF development there or serve as a springboard to pay-TV. I would greatly prefer an approach which would allow new systems—for a 5-year period which would allow time for staff growth and, perhaps, resolution of the copyright question—without extending any station's signal beyond its grade B contour, except upon authorization by the Commission in certain carefully defined situations. For example, I think we should permit greater extension of service by CATV systems where they carry signals into communities already receiving three network service over the air. But without some limitation which would stem the proliferation of cable systems in areas already receiving substantial television service, I am afraid that CATV will stunt future growth of our free television system, and perhaps even impair the viability of some of the stations now serving the public.

Even assuming that we should employ the majority's hearing procedure, instead of a rule which I think might be sounder legally, certainly simpler to manage, I would not cut it off at the top markets. While it is true that much current UHF activity is centered in these major markets, and that the risk of CATV becoming a TV on the basis of signals appropriated from the broadcaster is greatest there, I think there are compelling reasons for treating smaller markets in the same way.

It seems to me that the majority's concerns about economic impact and fair competition apply with even greater force in these smaller markets. Certainly many of the more than 130 stations in these markets are marginal operations, and therefore much less able to withstand duplication of their programs and fragmentation of their audiences than the more profitable stations in larger cities. I therefore do not think it is logical to subject them to greater exposure to CATV competition than the stations in major markets, which will be the effect of the majority's different treatment of the smaller markets.

One ground for this cutoff at the 100th market given by the majority is the fact that any delay incidental to the hearing procedures required is mitigated by the fact that the major markets generally have a considerable amount of service now, plus the prospects of new service. However, most of the markets from 75 to 100 have not more than 3 existing stations, while 20 markets below 100 also have 3 or 4 stations. It is true that the larger the market, the greater the likelihood that someone will be interested in building a fourth station. However, there has been interest in UHF stations to provide a fourth service in markets as far down as the 93d, and it seems likely that favorable conditions can be maintained, in due course such developments can be expected in still smaller markets. Similarly, there should eventually be interest in putting third stations on the air in the small 2-station markets. Beyond that, the Commission has many allocations of single UHF channels to medium-sized communities, and is presently proposing a class of low-power community stations to serve many more even smaller communities. Unless all these plans are to fail, the purposes of Congress in enacting the all-channel legislation to be frustrated, and this country to be left with a stagnant television system, our regulation of CATV operations must characterize their growth in ways which will not add to the problems facing upcoming UHF stations.

While the majority's proposal does not exclude the smaller markets from all relief, it at the very least raises procedural difficulties which I think impose unreasonable burdens on the very stations least able to bear them. In the first place, they must initiate the proceedings to consider the role of CATV in their market, while in the top 100 markets this burden is upon the CATV applicants. Then it seems to be suggested that different presumptions apply here, or that the burden of proof is shifted to the broadcaster, whereas in the larger markets it is on the CATV operator. It seems to me that in *all* markets, the burden should be upon the CATV interests to demonstrate that their projected operation will not damage or destroy local broadcast service.

of critical importance, of course, is what happens while the Commission is pondering these cases. In the major markets, presumably CATV activity must halt until we approve their entry. In the smaller markets, however, they can go ahead unless and until we act favorably on a request for stay.

Furthermore, the majority makes clear that in the top 100 markets private agreements between broadcasters and cable operators, though to be given weight, will not be controlling. However, this proviso apparently does not apply below the 100th market, and I'm afraid some broadcasters or prospective broadcasters in the smaller markets, faced with the added burdens outlined above, may try to work out arrangements whereby they will acquire partial interests in the CATV systems proposed for their areas in return, in part at least, for not instituting procedures to protest the CATV developments. While this may, to some degree at least, solve their personal financial problems, I am not sure it will adequately protect the public's interest in a free and available and potential free broadcast service. I certainly hope the small broadcasters will not take this course, but under the majority's procedures CATV can spread unchecked in these small markets unless someone—a broadcaster or a prospective applicant—goes to the trouble and expense of filing a protest.

One final thing concerns me about this different treatment of the smaller markets. I am afraid it will undercut our policy in the top 100 markets. If we permit the signals of the New York City independents to be put on CATV systems in smaller markets scattered around the country in areas falling between major markets, it seems to me this will create pressures to relax our policies so that the same service can be offered there. In paragraph 54 the majority justifies its failure to continue 15-day nonduplication as to new CATV systems by saying it would be anomalous to have different rules applicable to proposed systems. If they think that cable subscribers would object to mere delay in presenting programs that people in neighboring towns can see on the day of network release, what do they expect to happen when people in the top 100 markets find that they cannot get a service available to residents in smaller towns all around them?

The only way to deal realistically with this problem is to impose limits on the distance to which signals can be carried. I would treat all communities receiving usable services of the three networks alike, and require a showing in every case before permitting institution or extension of CATV operations employing distant signals.

#### SEPARATE STATEMENT OF COMMISSIONER LEE LOEVINGER RE SECOND REPORT AND ORDER IN CATV PROCEEDINGS

I concur in the substantive provisions of the order but I cannot join in the opinion or agree that the Commission has the jurisdiction which it now asserts.

The opinion (here called "second report") which purports to support the present order seems to me to illustrate many of the worst aspects of the institutional decision. The opinion does not really rationalize or justify the result reached, but rather accepts it some-

what grudgingly. This is a product of the fact that the opinion was originally drafted by the staff to support an entirely different result. Despite the efforts and instructions of the Commission, and a series of revised drafts, the instant opinion is substantially similar to the document which was written to support a different result. The opinion refers to little evidence and much of that is inconsistent, assumptions and speculation substitute for facts, the reasoning is circuitous and illogical, and the statement is so turgid and prolix that it does more to obscure than illuminate the subject. I can concur fully only in paragraphs 97, 98, 150, and 156 to the extent of my concurrence in the order.

What the Commission is doing in the instant order is to exercise its quasi-legislative powers. Consequently the decision to issue or join in the instant order is a legislative judgment. I concur in the substantive provisions of the order not because I think it is wholly logical or the best method of dealing with the subject, but because it seems to me to be the best and most reasonable proposal that has any practical chance of securing approval by a majority of the Commission. This is, in my opinion, a legitimate basis for making a legislative judgment.

On the other hand, the assertion of jurisdiction is a legal matter that requires a legal judgment. Nothing has appeared or occurred since the previous Commission statement on this subject that furnishes any basis for reaching a different conclusion as to jurisdiction than the one set forth in my prior opinion. (38 FCC 683, 746 (1965)). Accordingly I adhere to that opinion and to the conclusions stated there.

The Commission rule requiring a hearing before CATV is permitted to commence operation in any of the 100 largest markets is particularly questionable. The ostensible justification is that CATV might become pay-TV. This reason is flimsy, since that danger—if it is danger—could be met much more easily by less burdensome requirements.

Nevertheless the substantive position now adopted by a majority of the Commission seems to me to be the most moderate and reasonable compromise of sharply conflicting views and positions that has any practical chance of approval. It is of the greatest importance that the Commission now recognizes the necessity of requesting Congress to legislate on jurisdiction and other important aspects of this matter and has done so. In these circumstances, I think the most constructive and useful course is to support affirmative action by the Commission, leaving the jurisdictional issue to decision by Congress and the courts, and looking to Congress for further guidance as to regulatory matters. Accordingly I concur in the substantive provisions of the legislative rules now promulgated by the Commission.

2 F.C.C. 2d



## APPENDIX C

### 74.1105, 74.1107 AND 74.1109 OF THE COMMISSION'S RULES

47 CFR §§ 74.1105, 74.1107 AND 74.1109

(145)





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§ 74.110.5 *Notification prior to the commencement of new service*

No CATV system shall commence operations or commence supplying to its subscribers the signal of any television broadcast station carried beyond the Grade B contour of that station, unless the system has given prior notice of the proposed new service to the licensee or permittee of any television broadcast station within whose predicted Grade B contour the system operates or will operate, and to the licensee or permittee of any 100 watts or higher power transmitter station operating in the community of the system, and has furnished a copy of each such notification to the Federal Communications Commission, within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities; in any event, no CATV system shall commence such operations until thirty (30) days after notice has been given. Such notice shall be given by existing systems which propose to add new distant signals at least thirty (30) days prior to commencing service and by systems which propose to extend lines into obviously new geographic areas within sixty (60) days after obtaining a franchise or entering into a lease or other arrangement to use facilities or, where no new local authorization or contractual arrangement is necessary, at least thirty (30) days prior to commencing service. Where it is proposed to extend the signal of any noncommercial educational television station beyond its Grade B contour into a community with an unoccupied reserved educational television channel assignment under § 73.606 of this chapter,

the notice shall also be served upon the superintendents of schools in the community and county in which the system will operate and the local, area, and State educational television agencies, if any. The notice shall include the name and address of the system, identification of the community to be served, the television signals to be distributed, and the estimated time operations will commence. Where a petition with respect to the proposed service is filed with the Commission, pursuant to § 74.1109 of this chapter within thirty (30) days after notice, new service to subscribers shall not be commenced until after the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures; *Provided, however*, That service shall not be commenced in violation of the terms of any specified temporary relief or of the provisions of § 74.1107 of this chapter. Where no petition pursuant to § 74.1109 has been filed within thirty (30) days after notice, service may be commenced at any time thereafter, subject, however, to the provisions of § 74.1107. The provisions of this section do not apply to any signals which were being supplied to subscribers of the CATV system on March 17, 1966.

NOTE 1: As used in § 74.1105, the term "predicted Grade B contour" means the field intensity contour defined in § 73.683(a) of this chapter, the location of which is determined exclusively by means of the calculations prescribed in § 73.684 of this chapter.

*§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures*

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the

Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter. The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station be-

yond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines, after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however*, That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section: *And provided further*, That no CATV system located in the 100 largest television markets which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66-220, pars. 113-149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief: no CATV system coming within the fore-



going provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

**[§ 74.1107(d) as amended eff. 4-26-66; III(64)-13]**

*§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes*

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permittee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c) (1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the

only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any **facts or considerations relied upon.**

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorter time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter),

he Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

*Subpart K (§§ 74.1101-74.1109) as adopted eff. 6-18-66, except for § 74.1103 which is eff. 6-17-66 as it pertains to existing operations of nonmicrowave ATV systems and §§ 74.1105, 74.1107, and 74.1109 which are eff. 3-17-66; III(64)-12; § 74.1109(h) as adopted eff. 6-17-66; III(64)-13.]*

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## APPENDIX D

COMMENTS OF MIDWEST TELEVISION, INC.

DOCKET NO. 15971, FILED JULY 26, 1965

[Excerpts]

(155)





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V. THE COMMISSION SHOULD BY RULE STAY ALL  
FURTHER CATV ACTIVITY WITH PROVISION FOR  
APPROPRIATE EXCEPTIONS

A. THERE IS A VITAL NEED FOR EFFECTIVE INTERIM ACTION

29. The Commission has concluded that interim policies must be immediately implemented in order to place necessary restraints on CATV expansion pending the outcome of this proceeding. No other conclusion is possible in light of the virtually unrestrained mushrooming of CATV, in light of the very limited regulations now applicable to CATV and in view of the grave and immediate threat to the maintenance and development of UHF stations. Such an approach might not be necessary if CATV continued only within its historic role as a supplementary "fill-in" service. But that is not the case. Important CATV interests are intent upon making CATV a primary service, which will supplant instead of supplement free local and area television broadcast service. This is clear from repeated pronouncements of CATV industry leaders and from the direction in which CATV is moving.

30. If unchecked, the present trend will result, at the very least, in impairment of the service of existing local and area television stations and the frustration of UHF development. At worst, the present nationwide system of allocations and the principle of free television service provided by local and area stations attuned to the interests and needs of the areas they serve and provided to the entire public, whether rich or poor or urban or rural, will be replaced by a

wired television system, with programs originated in a few large metropolitan cities available only to those who can or will pay and only to those who live where there is sufficient population density to justify the laying of cables.

31. Appropriate carriage and non-duplication requirements, although essential to an effective system of CATV regulation, are not sufficient to meet these problems. CATV is increasingly importing and attempting to import distant stations into communities which are served by local and area television stations and into communities where the potential for the development of UHF stations is the greatest, as well as into communities which would be served by them and upon which UHF will depend for its development. Wholly apart from the matter of non-duplication and even if the Commission extends the period of non-duplication treatment as proposed above, the importation of distant stations will so fragment audience as to weaken the capacity of existing stations to serve the public or cause their demise and to preclude new UHF stations from going on the air or staying on the air if they do go on the air.

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## 2. *The critical situation in San Diego*

40. Midwest's concern with the unrestrained proliferation of CATV is by no means confined to central Illinois. In Southern California, within the service area of Midwest's station KFMB-TV, San Diego CATV has been growing at great speed. The first system in that area was franchised in March of 1963. Since then, seven additional systems have been franchised—one in September 1964 and two in just the last three months. All eight systems are within the Grade A contour of KFMB-TV, which falls within the metropolitan San Diego area; four of the systems are located in San Diego itself. System construction

does not of course begin until sometime after grant of a franchise, and four of the eight San Diego area CATV systems are not yet operative (though two of the four are expected to begin operating momentarily). Figures as to the number of subscribers these systems have secured are not public and, although Midwest has tried to obtain current data, the information was not made available. As of February 1965, the number was roughly estimated at approximately 9,000 homes. However, the installation of new cable has been proceeding at a furious pace in recent months. Midwest engineering personnel recently counted drops in a part of San Diego where CATV had been available for only three months. Of 159 homes in that area, 58 were wired for CATV—and this is an area where all three local stations can be satisfactorily received. In the June 1965 survey made for Midwest in the San Diego area by an independent research organization,<sup>1</sup> 300 cable subscribers were interviewed; 43 per cent had been subscribers for less than three months.

41. Nor have the Commission's admonitions to local authorities to proceed with caution curbed this activity thus far. Only recently the San Diego County supervisors approved a procedure for licensing CATV's in the unincorporated areas of the county. (*Broadcasting*, July 5, 1965, p. 80).

42. The three local VHF stations which serve San Diego already face serious audience fragmentation as a result of the importation of both network-owned and independent stations from Los Angeles and face the threat of yet more severe effects in the immediate future as operating systems expand their operations and as CATV systems which are franchised but not yet operating commence operations. All of this is true

<sup>1</sup> See footnote 2, p. 5, *supra*.

despite the fact that the stations are network affiliated, are well-established and have strong ownership and management, and despite the further fact that the San Diego market is a substantial one. Again, however, as in central Illinois, the most immediate effect will be upon the development of new UHF service. Construction permits are outstanding for two new commercial UHF stations to operate on Channels 50 and 51 in San Diego. Unless effective action is taken by the Commission, it is doubtful that either of these authorized UHF stations will go on the air or, if they do, that their operations will be viable.

43. There can be no doubt of the threat which this intensified activity poses to the development of UHF service in San Diego. The impact of rapidly expanding CATV on these *proposed* UHF stations can be clearly seen from the severe audience losses which the three *existing* VHF network affiliated stations face, as reflected in the June 1965 survey. Three hundred cable subscribers were asked, "Which channel do you now use most?" Only 49 per cent named a San Diego channel; fully 55 per cent named Los Angeles channel. The same question was put to two groups of non-CATV subscribers (150 in areas where there is CATV and 150 in areas where there is no CATV). San Diego stations were named by 10 per cent and 94 per cent, respectively, while Los Angeles stations were named by only 5 per cent and 11 per cent. The survey also asked about stations used next most and third most frequently. The results are dramatic:

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An additional 10 per cent made no choice. Percentages total more than 100 per cent because some multiple answers were given.



*Per Cent of Respondents Who Named a San Diego Station as One of the Three Stations That Were Used Most*

(Station Named)	Non-Subscribers	CATV Subscribers
FMB-TV	90%	44%
GO.	89%	48%
ETV	77%	29%

44. Perhaps even more striking, with respect to the impact on the proposed independent UHF San Diego stations, is the fact that 25 per cent of the 300 CATV subscribers interviewed named a Los Angeles *independent* station as the channel they used most; only 1 per cent and 2 per cent respectively, of the two groups of non-subscribers did so. Moreover, 56 per cent of the CATV subscribers (as compared with 1 per cent of non-subscribers) named at least one Los Angeles independent as one of the three stations used most.

45. Other statistical approaches likewise reveal that independents in communities like San Diego will have a rough go, at best. During the one-hour period from 5:00 to 6:00 in the afternoon, Monday through Friday, there was no duplication by Los Angeles stations of the programs broadcast in San Diego. In other words, all stations in both cities could be considered "independents" during that period, and a cable subscriber could watch any one of *ten* different programs. The audience lost to the Los Angeles stations was staggering. Among non-subscribers surveyed, 95 per cent of those who watched television during that hour watched one of the San Diego stations. Of cable subscribers, however, the three San Diego stations accounted for only 48 per cent of total viewing; the Los Angeles stations accounted for 52 per cent—16 per cent for the network stations, 36 per cent for the independents. One Los Angeles station alone (an independent) accounted for 20 per

cent, surpassing two of the three San Diego stations (which had 12 per cent and 11 per cent, respectively). Even during the 9-10 P.M. period on Sunday through Wednesday, when all San Diego programs were network programs duplicated by Los Angeles stations the Los Angeles independents accounted for 16 per cent of viewing time. In short, the new independent UHF stations proposed for San Diego will, in homes that are or will be CATV subscribers, be attempting to enter a market where, at various times of the day they will be attempting to compete for audience with ten other stations offering from seven to ten different programs to the public.

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#### B. THE SCOPE OF THE PROPOSED PROCEDURES IS TOO NARROW

48. For the foregoing reasons, Midwest strongly supports the Commission's approach of immediately taking interim action to keep the situation from getting out of hand while it proceeds to consider final and comprehensive regulations to govern CATV. However, the action must be expanded in scope if it is to be truly effective.

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#### C. A PROPOSED NEW INTERIM RULE

52. Accordingly, Midwest proposes that the Commission, by interim rule, issue a general stay against *all* further CATV activity where the CATV carrier or proposes to carry the signal of any station beyond its Grade B contour. While there should be such a general stay of all further CATV activity, Midwest believes it would be appropriate for the Commission to provide for an appropriate waiver of the stay in *limited* circumstances upon a special showing by the CATV system of public need for service. However

the Commission should *not consider* waiving such a stay except in those cases where the CATV system would serve a "white" area which is presently without any television service. In these cases the Commission should weigh the needs of the community against the possibility that CATV operations might impair the development of any existing, authorized or applied for local television station—UHF or VHF, independent or network-affiliated, commercial or educational—in the area. It should further consider the likelihood of off-the-air service to the community in question by translators or other low-powered stations.

53. The issue involved here is *not* a matter of making a final, complete disposition with respect to CATV regulation. The issue here is what action is required in order to maintain the orderly growth and development of television broadcasting during the pendency of these proceedings. This is not a situation where television service to the public would be frozen. Quite the contrary, the swift and orderly growth of UHF television will continue vigorously—even more so than if the Commission were to allow CATV to continue to expand "willy nilly" without direction, order, or purpose.

54. The stay rule proposed should become effective immediately upon its publication. It should be made fully effective with respect to (a) all subsequent CATV proposals, (b) all CATV systems which have franchise applications pending, and (c) all CATV systems for which franchises have been granted but which are not in operation. Any CATV system which was in existence prior to April 23, 1965, but which has subsequently expanded its lines or the number of its subscribers or has increased the number of stations carried since that date should be required to modify its operations to the extent necessary to

bring it into conformance with the interim rule. The April 23, 1965, cut-off date is entirely appropriate because that is the date when the Commission issued its *Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. [1]5971, where it "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not" (FCC 65-334, para. 65).

55. It is essential that the interim rule be made applicable to *existing* systems. The interim rule will be totally ineffective in many cities if non-conforming existing systems are allowed to continue to expand or extend their operations, string new cable, increase the number of subscribers, add outside stations, or in any other way expand their facilities or services. The continued expansion of non-conforming systems already constructed or operating can seriously damage existing local television operations, and could well foreclose the development of new UHF station operation forever. San Diego is an example of just such a situation. As previously mentioned, of the eight CATV systems in that area which are franchised four are presently in operation and are rapidly expanding their lines and subscribers.

56. Some of the damage in San Diego and elsewhere had already been done by April 23. But further CATV expansion has been pursued with the greatest vigor since that date, and the damage increases in proportion. And this has occurred in the teeth of the Commission's clear announcement in the Notice. The Commission should make plain that it means what it said. To avert to a useful analogy, the Commission has explained that the congressional policy behind requiring permits to *construct* broadcast

ations was "to discourage applicants [for operating licenses] from making large investments and using such investments as 'improper pressure' on the licensing authority." *WSAV, Inc.*, Docket Nos. 10517 and 10518, 10 R.R. 402, 403j (1955). In the circumstances, a rollback to the situation that existed on April 23, 1965, is singularly appropriate.

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## APPENDIX E

### COMMENTS OF ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.

DOCKET NO. 15971, FILED JULY 26, 1965

[Excerpts]

(167)



V. THE COMMISSION SHOULD BY SPECIAL RULES PROVIDE SUMMARY PROCEDURES TO HANDLE REQUESTS FOR OTHER OR DIFFERENT TREATMENT THAN PROVIDED FOR IN THE RULES

109. The Commission should adopt a specific rule providing for summary, non-hearing, procedures to handle claims for exceptions from any particular provision of the CATV rules and to handle requests for other or different treatment than is provided for in the rules, including the carriage, non-duplication and interim UHF rules. Such procedures would, for example, allow a party to whom the rules directly apply to seek a special exception from the rules or other special relief upon a showing of special circumstances or conditions justifying such treatment and would allow any other party affected by the rules to obtain an exception or special relief upon a similar showing.

110. In its *Notice of Further Proposed Rule Making and Notice of Proposed Rule Making* in Docket Nos. 14895 and 15233, the Commission proposed adoption of specific procedures whereby a party could seek special relief by showing that provisions of the then proposed CATV rules should not apply in the particular circumstances of the case (FCC 63-128, paras. 10-11, and proposed Sections 11.557 and 11.711). However, in its *First Report and Order* the Commission has deleted these proposed provisions, stating:

The Communications Act and our normal rules prescribe the procedures to be followed in considering applications for permits, licenses and other authorizations. Further, we have

provided generally for the consideration of requests for waiver of any rule. (See Section 1.3 of the Rules.) (FCC 65-335, para. 155)

However, neither existing procedures under the Act and the Commission's normal rules relating to applications nor the general waiver provision are adequate.

111. The present procedures for considering applications for permits, licenses and other authorizations would at the most only be applicable in the case of applications for microwave authorizations intended to serve CATV systems. Since the Commission has not asserted any general licensing authority over CATV systems, these procedures would not be applicable directly to CATV systems themselves and the Commission is proceeding to regulate CATV systems directly.

112. Nor does Section 1.3 of the existing rule afford an adequate procedure. This provision relates solely to the waiver of a rule. At best, it is doubtful that any party other than one to whom a rule is directed could request such a waiver. Thus, it is questionable whether a local broadcast station, for example, could seek the waiver of a rule which required or allowed a CATV system to carry the signal of another station in lieu of its signal. Moreover, even if it could do so, it is difficult to see how the relief would be adequate since Section 1.3 does not appear to contemplate anything other than a waiver or a *non application* of the rule in question, whereas *affirmative* relief may be required. For example, the Commission recognizes that, with respect to its system of priorities among stations as to carriage and non duplication, it may be necessary to "allow appropriate" relief upon the basis of a showing by one station that its signal should be afforded priority of treat



ment by the CATV system over the signals of another station which provides a calculated signal of equal or even higher grade (FCC 65-335, paras. 91(c) and 99, a. 55).

113. For such reasons, a procedure should be established by specific rule under which any party affected by the CATV rules could seek an exception or other appropriate special relief or treatment. We emphasize, however, that the procedures established for this purpose should require adequate notice to all interested parties, but should be summary in nature and should be confined to written submissions by the parties concerned, except where the Commission concludes that more is required in any particular situation. Burdensome and time-consuming evidentiary hearings on these matters as a matter of course would not serve the public interest and, moreover, are not necessary in order to provide effective relief where relief is appropriate.



REPLY BRIEF FOR  
PETITIONER SOUTHWESTERN CABLE CO.

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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**Case No. 21,183**

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SOUTHWESTERN CABLE CO.,

v.

*Petitioner,*

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

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**Case No. 21,192**

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MISSION CABLE TV, INC.,  
PACIFIC VIDEO CABLE CO.,  
and  
TRANS-VIDEO CORP.,

v.

*Petitioners,*

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

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ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

**FILED**

*Of Counsel:*

Tuttle & Taylor  
609 South Grand  
Los Angeles, California

DEC 5 1966

WM B LUCK CLERK

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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**Case No. 21,183**

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SOUTHWESTERN CABLE CO.,

v.

*Petitioner,*

UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION,

*Respondents.*

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**Case No. 21,192**

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MISSION CABLE TV, INC.,  
PACIFIC VIDEO CABLE CO.,  
and  
TRANS-VIDEO CORP.,

v.

*Petitioners,*

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and  
FEDERAL COMMUNICATIONS COMMISSION,

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---

ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

---

**REPLY BRIEF FOR  
PETITIONER SOUTHWESTERN CABLE CO.**



## SUMMARY OF ARGUMENT

1. The Commission lacks statutory authority to issue restraining orders unless provided in Section 312.

2. The temporary relief ordered by the Commission in the instant case is unlawful in that it (1) is not specifically authorized by law; (2) is inconsistent with the other powers granted to the Commission; (3) is issued without a hearing and is not limited to a shortly prescribed period of time; (4) is not issued in conjunction with a judicial or administrative proceeding but restrains lawful behavior pending a legislative hearing; and (5) is granted without a showing of irreparable injury or other findings of imminent public or private injury.

## SUMMARY OF FACTS

Petitioner operates a community antenna television system pursuant to a 30-year franchise issued by the City of San Diego. The franchise became effective October 30, 1964, and extends to an area lying north of the San Diego River Channel within the corporate limits of San Diego. The CATV system commenced service on December 22, 1965. For most of that time, the Commission neither claimed nor exercised any authority over CATV systems which relied upon off-the-air pickup.

It was not until March 8, 1966, that the Commission purported to assert regulatory authority over CATV systems relying, as Petitioner does, upon off-the-air pickup. These regulations were contained in the Second Report and Order, Dockets 14895, 15233 and 15871, 31 Fed. Reg. 4540. Sections 74.1107 and 74.1109 of the Commission's new regulations are relevant in this instance.

It is conceded that the Commission's existing regulatory scheme in no way prohibits Petitioner's present or proposed operations. Sec-

tion 74.1107(a) and (c) imposes certain restrictions upon the extension of television signals *beyond* the Grade B contour of a broadcasting station. Section 74.1107(d) provides, however, that these restrictions are not to apply to CATV systems which were in operation on February 15, 1966, as long as signals are not extended beyond their Grade B contour into "new geographical areas."

However, Section 74.1109 of the Commission's rules provides that the Commission may "impose additional or different requirements . . ."

On March 17, 1966, Midwest Television, Inc., licensee of KFMB-TV, San Diego, filed a petition with the Commission pursuant to Sections 74.1107 and 74.1109 of the Rules. The petition, and the April 4, 1966 supplement, requested the Commission to:

- (1) Grant Midwest immediate temporary relief by directing Petitioner, and other CATV systems, to "cease and desist from delivering Los Angeles signals beyond the boundaries of the geographical areas in which it was operating on February 15, 1966 . . ."; and
- (2) grant Midwest permanent relief confining carriage of Los Angeles signals by such CATV systems.

Petitioner, in its opposition, alleged among other things that its system was not carrying any station beyond its Grade B contours. Moreover, on May 31, 1966, a petition was filed with the Commission in Case No. 21192, pointing out that in another case pending before it (Docket 16575) testimony of the Commission's expert witness established that the Grade B contours of all Los Angeles VHF stations fell within the city limits of San Diego.

On July 25, 1966, the Commission issued its Memorandum Opinion and Order now under review, granting Midwest's request for temporary relief. The Commission directed Petitioner to confine delivery of the



Los Angeles signals carried on its system to subscribers within the areas served on February 15, 1966, and prohibited similar service to others within Petitioner's overall franchise area. With respect to the temporary relief, the Commission concluded that such relief ". . . is necessary and appropriate'before consequences possibly adverse to the public may develop'." (Memorandum Opinion and Order, Par. 20, R. 589)

In the Brief filed by Respondents in this Court, the Commission admits that (1) the Commission has assumed that Petitioner's systems are within the Grade B contours of the Los Angeles stations; and (2) the Commission has not found that Petitioner's operations are in violation of Section 74.1104 of the Rules, or any other substantive rule or statutory provision. (Brief for Respondents, p. 33)

Accordingly, Respondents concede that Petitioner is not charged with the violation of any Commission rule or statutory provision. Respondents also concede that Section 312 of the Federal Communications Act requiring a hearing before the issuance of a cease and desist order does not authorize the restraints imposed in this case. The purported justification for the restraint of Petitioner's lawful activities is the claim that the Commission, based on the general powers vested in it, has authority to issue "temporary" restraints without regard to the Congressional standards contained in Section 312.

It is respectfully submitted that this position is a clear exposition of an unbridled exercise of governmental powers contrary to established judicial authority and traditional legal and constitutional concepts.

## I.

Respondents and Intervenors argue in their briefs that the temporary relief issued by the Commission is not a cease and desist order in that it does not estop a continuation of Petitioner's existing service but only prevents its expansion. It is asserted that the Commission sought to preserve the *status quo* rather than disturb it. Yet, the mere fact that the Commission's order is so limited does not make it any less a cease and desist order.

Cease and desist orders are in the nature of injunctions. *Forkosch Administrative Law* (1956), § 270, at 499, § 277 at 515. *National Labor Relations Board v. Colten*, 105 F.2d (C.A. 6th Cir. 1939) 179, 183. Like injunctions, cease and desist orders have always been directed not only against existing evils, but also against the threat of future evil. Injunctions are of two types: (1) prohibitory injunctions which preserve the *status quo* and operate to restrain the commission or continuance of an act; and (2) mandatory injunctions which contemplate a change in the *status quo* and command an act to be done or undone. 28 Am. Jur. § 18, pp. 508, 509. Respondents argue that the restraining order issued by the Commission is prohibitory and not mandatory; that it is not a cease and desist order; and may be issued by the Commission in any manner it elects. But the prospective nature of the order does not distinguish it, however, from cease and desist orders. Cease and desist orders, as implied in the very term, may, like injunctions, be of dual character, containing both prohibitory and mandatory provisions. 28 Am. Jur. § 18 at 509. ". . . a cease and desist order is of the nature of injunction, and its affirmative provisions are analogous to those of one that is mandatory." *N.L.R.B. v. Colten*, 105 F.2d (C.A. 6th Cir. 1939) 179, 183.

Section 312 of the Communications Act specifically spells out the prerequisites for the issuance of a cease and desist order. Section 312(b) limits the Commission's power to cases where a person (1) has

failed to operate substantially as set forth in his license, (2) has violated various provisions of the United States Code, or (3) has violated the rules or regulations formulated by the Commission. Section 312(c), moreover, provides for an oral hearing before the Commission prior to the issuance of the cease and desist order. Neither of these requirements has been complied with in the instant case. The first requirement, a violation of law, regulation or license, is completely inapplicable because Petitioner had, in fact, been engaged in a lawful undertaking. The second requirement, being procedural in nature, the Commission could have complied with but chose instead to neglect, knowing that the substantive requirement of unlawfulness was not available to justify its proposed order.

A cease and desist order remains one even when it goes by any other name. Failing to comply with the standards that Congress imposed upon the Commission in the exercise of this power, the temporary relief granted by the Commission in the instant case is unauthorized and invalid.

Arguing that the restraining order issued by the Commission is intended against future rather than existing evils and that, therefore, it requires lesser standards is sheer sophistry. In fact, contrary to the implications of Respondents' Brief, it appears that even greater caution must be exercised in cases involving contemplated and, therefore, uncertain threats than in the case of existing evils -- where the evil is more easily demonstrable. ". . . the power to grant injunctive relief is never exercised to allay mere apprehension of injury . . ." 28 Am. Jur. § 29 at 520. *Connecticut v. Massachusetts*, 228 U.S. 660, 75 L. ed. 602; *Continental Baking Co. v. Woodring*, 286 U.S. 356, 76 L. ed. 1155.



## II.

Respondents and Intervenors state that instead of relying upon the specific cease and desist procedures contained in Section 312 of the Communications Act, the Commission acted in pursuance of the general authority vested in it under Sections 4(i) and 303(r) of the Act.

Section 4(i) of the Communications Act, 47 U.S.C. § 154(i), provides that the Commission "may perform any and all acts, make such rules and regulations, and issue such orders, *not inconsistent* with this Act, as may be necessary in the execution of its functions." (Emphasis added.) As previously pointed out, this subsection is contained in a section entitled "Provisions Relating to the Commission" and dealing with such housekeeping matters as the number and salaries of the Commissioners, the location of the principal office, the overtime pay to staff engineers, expenditure for rent, office supplies, periodicals, etc. The subsection immediately preceding 4(i) defines a quorum and provides that the Commission is to have an official seal. 47 U.S.C. § 154(h). It is perfectly plain that subsection 4(i), on which the Commission is relying in its desperate search for authority, was never intended as grant of authority for the extraordinary sanction involved in the instant case. The attempt by the Commission to circumvent the specific language of Section 312 by supposedly proceeding under the implied powers of Section 4(i) and, thus, according an admittedly law-abiding citizen lesser protection than accorded to one charged with violations of the law is certainly *inconsistent* with the Congressional formula and plan as contained in the Act.

Respondents also rely upon Section 303(r) of the Communications Act. Respondents assert (Brief p. 36) Commission's implied authority by quoting the section's language to the effect that the Commission shall "(r) make such rules and regulations and prescribe such restrictions

and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . ." Here too the desperate groping search for authority comes to naught. Section 303 of the Act contains comprehensive authorization for the regulation and classification of radio stations, the assignment of frequency bands, the prescription of qualifications for station operators, and even the suspension of operator licenses (*after oral hearing*). Section 303(r) is intended to give the Commission some discretion in regulating radio stations. It is completely specious and illogical to assert that such authority overrides the special cease and desist provisions of Section 312 and is sufficient to grant the Commission broad injunctive powers.

Petitioner, in its main Brief, effectively demonstrated that the action now undertaken by the Commission is contrary to prior Commission rulings (Brief for Petitioner, pp. 12-55) and contrary also to the Commission's own explanations, in the Second Report and Order, as to how sanctions under new Rule 74.1109 were to be exercised. (Brief for Petitioner, pp. 11-12)

Petitioner also reviewed the legislative history of Section 312, which Respondents now discard as unnecessary in their claim for broader power, to demonstrate the narrow grant of sanction powers to the Commission. Prior to the adoption of Section 312, the Supreme Court recognized this limitation on the Commission's authority and held that previous cases before the Court "make clear that the Commission's regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." *Regents of Georgia v. Carroll*, 338 U.S. 586, 598-599 (1950). Noting also that the Commission had sought additional sanctions from Congress, the Court pointed out that these requests " . . . did not go beyond asking for power to issue a cease and desist order against a licensee." (*Id.* at 602) Section 312 was subsequently adopted by Congress as directed



to meet this particular need and no more. (Brief for Petitioner, pp. 15-18)

Petitioner's Brief also cited controlling judicial precedents to the effect that suspension of an existing letter of registration could not be undertaken without prior hearing. *Standard Airlines, Inc. v. Civil Aeronautics Board*, 85 U.S. App. D. C. 29, 177 F.2d 18 (1949). Likewise, the Supreme Court has held that cease and desist orders cannot be extended beyond the specific limits established by Congress. *N.L.R.B. v. Express Pub. Co.*, 312 U.S. 426, 434 (1941). Even greater caution had been shown towards general injunctive powers. Referring to an order of the Federal Maritime Board prohibiting a voluntary association of steamship companies from assessing fines, the Court of Appeals for the District of Columbia Circuit, likewise, declared:

"The power which the Board now claims is in many ways a drastic one, and, in fact, more akin to judicial injunctive power than the power which Congress has given some agencies to issue cease and desist orders against conduct *deemed in violation of law* . . . We will not lightly assume that Congress has attempted to confer injunctive powers on this or any other administrative agency." (Emphasis supplied) *Trans-Pacific Frgt. Conf. of Japan v. Federal Maritime Board*, 112 U.S. App. D.C. 290, 302 F.2d 875, 880 (1962).

The sanction undertaken by the Commission in the instant case falls squarely within the warning voiced above.

The Federal Communications Commission was not satisfied with the powers lawfully granted it by Congress. It was not satisfied with the cease and desist power against "conduct deemed in violation of law," and which required that a hearing first be held. In the instant case, Respondents are asserting their newly discovered injunctive right, without any statutory authority, to proceed against conduct not deemed in violation of law and to do so without an opportunity for a prior hearing.

The injunctive sanction claimed by the Commission in the instant case is one jealously guarded by our courts. In *Federal Trade Commission v. Dean Foods Co.*, 16 L. ed. 802 (1966), decided only recently by the United States Supreme Court, the question was not whether an administrative agency itself could issue an injunction, but whether it could seek one in the appropriate courts. The argument of respondent in that case was that the Federal Trade Commission was a creature of statute and that Congress had failed to give it express statutory authority to seek such preliminary relief. In deciding for respondents, the Court said: "Congress has never restricted the power which the courts of appeal may exercise under that Act [Judiciary Act of 1789]. Nor has it withdrawn from the Commission its inherent standing as a suitor to seek preliminary relief in courts of appropriate jurisdiction." (At 809)

In the *Dean Foods* case, the Federal Trade Commission had commenced administrative action to determine whether a proposed merger violated the antitrust law. In connection with this action, the Commission also applied to the courts for temporary relief, and was required to comply with the standards of proof applicable to such equitable relief. In the instant case, the Respondents claim this same right all to itself, without specific statutory authority and without compliance with the substantive and procedural requirements applicable to injunctive relief.

It has been said an injunction is "an extraordinary remedial process which is granted, not as a matter of right but in the exercise of sound judicial discretion." *Hurd v. Hodge* (1948), 334 U.S. 24, 36, 92 L. ed. 1187, 68 S. Ct. 847, per Frankfurter, concurring. The Supreme Court of the United States has previously said:

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly

be anticipated from the defendants' conduct in the past." *N.L.R.B. v. Express Publishing Co.* (1941), 312 U.S. 426, 435, 85 L. ed. 930, 61 S. Ct. 693.

Neither Congress nor the courts has treated lightly the grant of the equity injunction power to administrative agencies. Only one limited form of this power, the issuance of cease and desist orders, was granted to administrative agencies to any extensive degree whatsoever: yet, even this power must rest on express Congressional authority and its use is prescribed by the requirements of a hearing and a finding of unlawfulness. Moreover, in enforcing such orders, administrative agencies must resort to the contempt powers of the courts, since courts only may exercise this power. Schwartz, *American Administrative Law* (2nd Ed.) 104.

Congress' caution in disbursing injunctive powers to federal administrative agencies clearly demonstrates that such power cannot be vested by remote implication. Since Congress has specifically provided the Commission with the limited cease and desist power under Section 312 of the Communications Act, there is no ground for the Commission's argument that even broader injunctive powers — and without time limits — were intended for it by implication. Such, indeed, would be a "delegation running riot." Per Cardozo, concurring, in *Schechter v. United States*, 295 U.S. 495, at 553 (1935).

The Commission's claim of implied power in the instant case is objectionable, furthermore, because it is sought not in conjunction with judicial or administrative proceedings, but in connection with what are, in fact, legislative hearings. The distinction is most significant. "A judicial inquiry," said Justice Holmes, "investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by



making a new rule to be applied thereafter . . ." *Prentis v. Atlantic Coast Line Company*, 211 U.S. 210, 226 (1908).

Since in the instant case it is admitted that Petitioner in no way violates existing laws, rules or regulations, it inescapably follows that what the Commission seeks to do is to restrain (and punish) conduct not now prohibited, but such as may become prohibited upon the termination of the Commission's proposed legislative hearings. In so doing, the Commission is seeking for itself powers that Congress and the courts of this nation could not take upon themselves — the power to punish and restrain certain acts before such acts become, in fact, prohibited and before notice of such prohibitions is publicly given. In enjoining Petitioner in what is lawful, the Commission not only acts without statutory power, but infringes upon the constitutional prohibition against bills of attainder and *ex post facto* laws (Section 9, Article 1, Constitution of the United States) and the Fifth Amendment guaranty of "due process."

Final comment should also be made on the cases upon which Petitioner and Respondents mainly rely.

Respondents (at pp. 46 and 47 of their Brief) have sought to justify the exercise of injunctive powers by the Commission by relying upon the "general rule making power" contained in Sections 4(i) and 303(r) of the Communications Act. Respondents cite the Supreme Court decisions in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-203 (1956), and in *National Broadcasting Company v. United States*, 319 U.S. 190, 218-220 (1943), in support of this proposition. These cases do not deal, however, with the question of the Commission's present claim for *injunctive equity powers*. They merely deal with the specific and limited question whether the Commission, acting within its well-defined licensing capacity, may formulate rules for the licensing and regulation of broadcasting not specifically authorized by statute. This

is obviously a totally different question. The Supreme Court's recognition of the rule making powers contained in Sections 4(i) and 303(r) relates to matters entrusted to the Commission and certainly do not encompass a grant of the carefully guarded injunctive power.

Both Respondents and Intervenors have expended a great amount of effort to distinguish between the cases previously cited by Petitioner and the instant facts. In so doing, Respondents and Intervenors reach the ludicrous result of advocating more procedural due process to an alleged law violator than to one who abides by it. They thus distinguish between an administrative agency's suspension of a prior license (there they assert a right to hearing exists) and the instant case (where no prior license was required) and, therefore, they assert no concomitant right to hearing need be recognized before such activity is enjoined. Referring to the *Standard Airlines* case and the *Federal Maritime Board* case cited by Petitioner, Respondents seek to distinguish them from the situation in the instant case as follows: "In the first place, both of those cases involved a summary suspension of activities previously approved by the agency, rather than a stay of planned operations not yet in being, pending a determination as to whether they should be authorized." (Brief for Respondents, p. 49) What Respondents clearly fail to point out is that the activity carried out and proposed to be carried out by Petitioner needs no Commission authorization whatsoever as long as it is, as in this case, beyond the Grade B contour. In summary, it is apparent that Respondents' distinctions are completely specious. What they argue is that a case involving termination of a privilege for an alleged misfeasance requires more due process protection than a case involving a person's deprivation of a right to do something lawful in the first place. As previously stated, what the Commission is seeking in this case is to estop Petitioner's lawful activity pending a legislative hearing by the Commission to determine whether the particular lawful activity of Petitioner should be prohibited.



Finally, apart from Respondents' lack of authority to take upon itself injunctive powers exercised without a hearing and not strictly limited by time requirements, it is submitted again that no "irreparable injury" to either the public interest or to Intervenor was demonstrated to justify the drastic action in the instant case. Respondents, in their own Motion for Reconsideration of Stay Order and Opposition to Motion for Stay, before this Court, admitted with regard to the need for its restraining order as a protection for the public: "While such addition of new subscribers would not by itself cause any immediate public harm in terms of competitive effect upon the service of the local television stations, it would constitute exactly the sort of entrenchment which the Commission is trying to avoid. For it would mean additional disruption to the public in the event it is determined in the hearing to be held that CATV systems in San Diego should not be permitted to bring in Los Angeles signals." (p. 14)

The facts in this case certainly do not fall within the standards which have justified the traditional exercise of the injunctive power. The restraining order issued in the instant case, indeed, must fall because it is contrary to existing law that "Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared or liable to occur at some indefinite time in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1930).

CONCLUSION

The Commission is without authority to restrain Petitioner's operations which comply with all statutory and administrative requirements.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONERS,  
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO.,  
AND TRANS-VIDEO CORP.

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ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
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DEC 5 1965

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**REPLY BRIEF FOR PETITIONERS,  
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO.,  
AND TRANS-VIDEO CORP.**

a Washington agency that most of the San Diego public must view San Diego television programs and not those programs produced by Los Angeles stations, *irrespective of what the San Diego public may want*. The First Amendment was designed not only to prohibit prior restraints that are bad for the public, but also to prohibit prior restraints that may be considered by some well-intentioned government servant to be good for the public, i.e., will serve the public interest. The stay order demonstrates that the Commission does not intend to allow both local and outside television signals to be made available to the public so that the public, after being fully informed, may decide which station it will view and which it will not. Rather, it has decided to prohibit the importation of Los Angeles signals because it has determined that the public must view the signals of local television stations whether it wants to or not. The present order is a prime example of the difference between the legitimate and reasonable limit upon the protection afforded by the First Amendment in order to make as many physical broadcast facilities available to the public as possible by requiring a license to operate a broadcast station, and the unreasonable restraint on this freedom in an attempt to guarantee the continued operation of allocated facilities by prohibiting the origination of competing program services. Moreover, despite Respondents and Intervenor's contentions to the contrary, the prohibition against carrying the Los Angeles signals is as absolute a prohibition against originations as would be a prohibition against CATV's using a television camera to present shows. It should be clear that whether the system presents a film program, made by others, on a television film camera, or picks up that same film program from a television signal, it is originating a program. It is submitted that a ban on either procedure is a clear violation of Freedom of Speech.

## II

**The Federal Communications Commission Lacks  
Statutory Jurisdiction To Regulate CATV Systems**

Petitioners submit that Intervenors' argument, presented on page 46 of its Brief, that this Court need only determine that the Commission's claim of jurisdiction over CATV systems is not patently defective in order to affirm the Commission's order, is clearly erroneous. Intervenors rely upon *Federal Power Commission v. Arizona Edison Co.*, 194 F.2d 679 (C.C.A. 9th, 1952) for the principle that the Court may confine itself to a determination that the Commission has not ". . . patently traveled outside the orbit of its authority . . ." by finding jurisdiction or a lack of same ". . . on the face of the order." Intervenors must be aware that *Arizona Edison* arose on entirely different procedural grounds: The Federal Power Commission sought to secure enforcement of an order in United States District Court, and then appealed an unfavorable decision to this Court. The instant case, on the other hand, is not an enforcement proceeding instigated by the Commission but rather a petition to secure full judicial review of a Commission order, in complete accordance with the judicial review provisions of the Communications Act of 1934. In short, there is no similarity between the procedural background of *Arizona Edison* and that of this case. It is clear, therefore, that there is nothing to bar this Court from considering the jurisdictional issue and, upon a full consideration of the merits, reversing the Commission's Memorandum Opinion and Order.

## III

**Section 74.1109 of the Rules Adopted by the Commission  
To Control CATV Systems Is Void for Failure of the  
Commission To Comply With the Provisions of Section  
4 of the Administrative Procedure Act.**

All parties appear to be in agreement that Section 4(a) of the Administrative Procedure Act does not require publication in a notice of proposed rule-making of the precise terms of the proposed rules. However, what does constitute sufficient notice is a matter of dispute. Respondents now contend that Petitioners received legal notice both from the Notice of Rule-Making and from the counterproposals contained in the Comments filed by the Association of Maximum Service Telecasters.

Petitioners in their Brief, argued that notice, adequate to comply with Section 4(a) and (b) of the Administrative Procedure Act, was not given by the Commission prior to adoption of Section 74.1109. In this regard, it should be noted that nowhere in the provisions of Section 74.1109 is mention made of "Grade B contours", "distant signals", "100 largest television markets", "major centers of population" or "UHF stations". Thus, most of the material cited from the Commission's Notice of Proposed Rule-Making by Respondents and Intervenors as supplying notice to Petitioners is in fact irrelevant since it in no way advised Petitioners that provisions similar to those contained in Section 74.1109 might be adopted. So far as any notice was given by the cited material, it was notice of the pendency of Section 74.1107, and Petitioners are not challenging the procedures leading to adoption of Section 74.1107. The order before this Court for review is not founded on Section 74.1107, nor is it premised on a finding that Petitioners' CATV systems are carrying "distant" or "beyond Grade B contour" signals.



It is submitted also that Intervenors' and Respondents' reliance upon the comments filed by Association of Maximum Service Telecasters in the rule-making proceeding, as a counterproposal which constituted notice, is misplaced. Nothing before this Court indicates in any way that Petitioners, or any one of them, had actual notice or knowledge of these comments, which are excerpted beginning at page 59 of Intervenors' Brief. These comments were not served on Petitioners, nor was their filing or content disclosed by any public notice of the Commission. One of the Petitioners, Trans-Video Corp., filed reply comments which were directed solely to the comments of Midwest Television, Inc. (Intervenors' Brief, p. 65). Midwest's comments did not propose any rule resembling Section 74.1109.

Petitioners also submit that neither the cited comments nor the listed portions of the Notice of Proposed Rule-making constitute legal notice to Petitioners. Petitioners, in their Brief, contrasted the factual situation of *Owensboro-on-the-air v. United States*, 104 U.S. App. D.C. 391, 262 F.2d 702 (1958), *cert. denied*, 360 U.S. 911 (1959), with the situation in the rule-making proceeding before the Commission which led to adoption of the CATV rules. The subject matter in *Owensboro* was the allocation of UHF and VHF channels in two small communities; the issue as it developed was simply whether these two cities in the Kentucky-Indiana area involved were to be allocated VHF or UHF channels. The number of parties and comments were limited. Each party was aware of what had been filed by the others. It was, in reality, similar to an adversary proceeding. The Court was able to find that the parties attacking the rule-making as being violative of Section 4(a) of the Administrative Procedure Act had ". . . complete awareness of the Commission's proposal and of the counterproposals." *Supra* at 395, 262 F.2d at 706. In contrast, the CATV rule-making dealt with the en-

tire United States, and contained comments filed by a large number of parties, many of which were of great length.<sup>1</sup>

Moreover, *Owensboro* cannot be said to stand for the doctrine that in every rule-making proceeding a counterproposal may cure defects or fill in voids in the notice of proposed rule-making. The Court, in deciding *Owensboro*, was moved to state that its decision rested ". . . particularly on the facts of this case." *Supra* at 396, 262 F.2d 707. The facts of *Owensboro*, running from the degree of specificity of the Commission's original notice of proposed rule-making to the number of parties involved and to the limited number of possible resolutions of the issue, differ starkly from the facts of the proceedings which led to adoption of Section 74.1109.

If the Commission chose to rely on the alternative allowable under Section 4(a)(3) of the Administrative Procedure Act, and meant to publish a notice of proposed rule-making including a description of the "subjects and issues involved", rather than one including the "terms or substance of the proposed rule", it failed to achieve that objective. Viewed in retrospect, as to Section 74.1109, the subject of the notice should have been CATV regulation, and the issue should have been whether to adopt a summary, non-hearing procedure for issuing a stay of CATV activities not found to be in violation of the other sections of the Commission's new CATV rules. Nowhere in the Commission's Notice of Inquiry and Notice of Proposed Rule-making is such an issue set forth. The statement at page 69 of the Respondents' Brief that ". . . one of the basic issues set forth . . . was the potentially harmful effect upon 'free' local television, and particularly the effect upon independ-

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<sup>1</sup> Contrasted to the six or seven parties participating in *Owensboro*, Appendix A to the Commission's Second Report and Order, 31 F.R. 4540, 4565, lists sixty parties as having filed comments and/or reply comments ". . . on Part I and paragraph 50 of this proceeding . . ."

ent . . . UHF stations, of 'the mushrooming entry of CATV into major centers of population' . . ." fails to support the adoption of Section 74.-1109.

The cases cited in the Briefs of Respondents and Intervenorers do not support the contention that the Commission has complied with Section 4 of the Administrative Procedure Act in this proceeding. *Willapa Point Oysters, Inc. v. Ewing*, 174 F.2d 676, 685 (C.C.A. 9th, 1949), *cert. denied*, 338 U.S. 860 (1949), cited by the Respondents, accords completely with Petitioners' view that when an administrative body chooses to publish a description of the subjects and issues involved in a rule-making proceeding, it must be so phrased that parties ". . . know exactly what issue they would confront . . ." in the proceeding. *Civil Aeronautics Board v. State Airlines, Inc.*, 388 U.S. 572, 578, 94 L. Ed. 353, 359 (1950), cited by Intervenorers, stands for the principle that the prime purpose of the notice requirements of the Administrative Procedure Act is to give the administrative body ". . . the advantage of all available information as a basis. . ." for rule-making or adjudication. Petitioners agree with this statement by the Supreme Court, but submit it has no materiality to the pending issue, since this Court cannot find, as the Supreme Court did in *State Airlines*, that Petitioners were fully aware of any issue in the proceedings before the Commission which could have lead to the adoption of Section 74.1109.

It is also submitted that the contention, raised by Intervenorers but not by Respondents, that Petitioners are barred by Section 405 of the Communications Act of 1934, as amended, from challenging the adequacy of the notice is without merit. Section 405 contains no requirement, contrary to Intervenorers' apparent assumption, that Petitioners here must have raised this particular point before the Commission. The filing of a petition for reconsideration before the Commission is a condition precedent to judicial review of a Commission order only if the appellant was not a party to the proceedings before the Commis-



sion, or reliance is placed on ". . . questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass."

The Commission has had an opportunity to pass on the question of compliance with Section 4(a) and (b). For example, a petition for reconsideration of the Second Report and Order in Docket Nos. 14895, 15233 and 15971 was filed by Cox Broadcasting Corporation.<sup>2</sup> The petition for stay of the rules adopted by the Second Report and Order, filed by Cox Broadcasting Corporation, incorporated by reference all the arguments in the Petition For Reconsideration. The Petition For Stay was denied on May 25, 1966.<sup>3</sup>

Petitioners were parties to the proceedings before the Commission resulting in the order presented here for review, and the Commission has had opportunities to pass on all of the questions presented for review. For this reason, Section 405 of the Communications Act contains nothing to bar this Court's review of the adequacy of the notice given to

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<sup>2</sup> "By totally failing to approach even some degree of specificity in its April 23, 1965, Notice with respect to the details of the Second Report and Order, the Commission has violated Section 4(a) and (b) of the APA and must, therefore, reconsider and repropose the *specifics* of the new CATV regulations. As a matter of fact, Docket 15971 clearly led Petitioners to believe that they would definitely be allowed to state their views, both orally and in writing on the details of any proposal." Petition for Reconsideration, Cox Broadcasting Corporation and Cox Cablevision Corporation, April 18, 1966, p. 15.

<sup>3</sup> In the petition for stay, filed before the Commission by Cox Broadcasting Corporation, et al., the entire Cox petition for reconsideration was incorporated by reference. (Petition for Stay, Dockets Nos. 14895, 15233, 15971, Cox Broadcasting Corporation, April 18, 1966, p. 2.) The Commission denied the petition for stay, saying, "Our action was not taken without adequate prior notice to potential CATV operators and local franchising authorities. The Notice of Inquiry and Notice of Proposed Rule-Making in Docket No. 15971, issued on April 23, 1965 and published in the Federal Register (30 F.R. 6078) put all persons on legal notice that the Commission might take action of a substantially similar nature." *CATV Regulation*, 7 Pike and Fischer, R.R.2d 1627, 1639 (1966).

determine if it complies with the provisions of Section 4(a) and (b) of the Administrative Procedure Act.

## IV

### Summary

It is submitted that the Respondents' and Intervenors' argument in this case clearly illustrates the growing tendency of administrative agencies to assert jurisdiction over any activity that is in any way related to the area in which they have specific authority, without regard to the intent of Congress or the language of the statute. It also is a logical extension of the argument made time and time again by Respondents in broadcast cases that, while everyone is entitled to freedom of speech, any regulation or rule the administrative agency makes, which in its opinion serves the public interest, is a reasonable restraint no matter how much it affects the public's right to be informed or a citizen's right to communicate.

Petitioners submit that the Communications Act was never designed to give the Commission authority to provide or deny broadcast signals to any community except insofar as it was necessary to protect the commission's duty to license or allocate broadcast facilities in order to make the greatest number of stations available to the greatest number of people. In a like manner, it is clear that the Commission cannot limit what the public may hear simply to ensure that the facilities previously made available to a community will be used whether the public wants them or not. The issue in this case is very simple. Who is to be the ultimate judge of the public interest in program information — the American public or an administrative agency in Washington? Petitioners submit that the answer is clear — both Congress and the Constitution place that responsibility in the American public.



For these reasons, the Memorandum Opinion and Order of the Federal Communications Commission granting a temporary stay of Petitioners' right to carry the signal of the Los Angeles television stations and designating the proceeding for hearing should be reversed and remanded with instructions to set aside the temporary stay and dismiss the petition of Midwest Television, Inc.

Respectfully submitted,

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APPENDIX

[577]

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FCC 66-683  
86403

In the Matter of the Petition of

MIDWEST TELEVISION, INC. (KFMB-TV)  
San Diego, California

For Immediate Temporary and for Permanent  
Relief against Extensions of Service of  
CATV Systems Carrying Signals of Los  
Angeles Stations into the San Diego, Area.

Petitioner

MISSION CABLE TV, INC.  
El Cajon, California

SOUTHWESTERN CABLE CO.  
San Diego, California

PACIFIC VIDEO CABLE CO., INC.  
El Cajon, California

TRANS-VIDEO CORP.  
El Cajon, California

RANCHO BERNARDO ANTENNA SYSTEMS, INC.  
La Jolla, California

and

POWAY CABLE TV  
Poway, California

Respondents

DOCKET  
NO. 16786

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Bartley and Loevinger dissenting;  
Commissioner Johnson not participating.

1. The Commission has before it for consideration a petition filed on March 17, 1966, by Midwest Television, Inc., (Midwest) licensee of KFMB-TV, San Diego, California, a supplement thereto filed on April 4, 1966, and responsive pleadings in connection therewith.<sup>1/</sup> The petition

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<sup>1/</sup> The following responsive pleadings have also been filed and considered: Comments of Jack O. Gross, (Gross) permittee of Station KJOG-TV, San Diego, filed on April 15, 1966; Opposition to petition and supplement filed by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-

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was filed pursuant to Section 74.1107 and 74.1109 of the Commission's Rules, adopted March 8, 1966, effective March 17, 1966 (31 F.R. 4540) 2/, and requests basically that the Commission immediately order respondents, pending final disposition of the petition, to cease and desist from extending service to additional subscribers served by their respective systems within the Grade A contours of the San Diego stations and, after any necessary hearing, issue a final order appropriately confining carriage of Los Angeles television signals by respondents' San Diego area systems. In its later pleadings, Midwest modified its initial request for temporary relief to a request that respondents be directed not to extend the Los Angeles television signals to subscribers beyond the specific geographic boundaries of areas in which subscribers were being served on February 15, 1966.

2. In support of its requests for relief, Midwest states that respondents are the holders of franchises to operate CATV systems is-

sued by the cities of San Diego, Chula Vista, National City, La Mesa, Imperial Beach, El Cajon, and San Diego County.<sup>3/</sup>

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1/ (continued)

Video Corp. (hereafter collectively referred to as Mission) on April 18, 1966; Opposition to petition and supplement filed by Southwestern Cable Co. (Southwestern) on April 18, 1966; a Statement of Position filed by Southwestern on April 18, 1966; a Motion to Sever filed by Southwestern on April 18, 1966; A Motion to Dismiss filed by Southwestern on April 18, 1966; an Opposition and Petition to be Dismissed filed by Rancho Bernardo Antenna System (Rancho) on April 18, 1966; a Reply of Petitioner to Opposition to petition for immediate temporary relief and Answer to Motion to Dismiss petition for immediate temporary relief filed by Midwest on April 25, 1966; an Answer to Motion to Sever filed by Midwest on April 25, 1966; a Reply of Petitioner to Opposition to petition for permanent relief and Answer to Motions to Dismiss petition for permanent relief filed by Midwest on May 2, 1966; and a Reply to Answers of Midwest to Motions to Sever and Dismiss filed by Southwestern on May 5, 1966. Additional interlocutory pleadings concerning extensions of time were filed and have been acted upon, pursuant to delegated authority. On April 6, 1966, Poway Cable TV filed a motion asking that it be dismissed as a party respondent; Midwest filed an answer stating that in view of the agreement reached, it would be appropriate to dismiss Poway as a party. We will grant this request.

2/ Section 74.1107 of the Commission's Rules relates to CATV systems operating or proposing to operate in one of the top 100 television markets and carrying distant television stations' signals. Section 74.1109 of the Rules relates to the filing of petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

3/ Trans-Video is 100% owner of Pacific Video, majority owner of Mission Cable and has a minority interest in Southwestern. It has no franchises



The City of San Diego has a population of approximately 648,500 occupying 208,631 housing units and the County of San Diego has a population of approximately 1,213,000 occupying 379,483 housing units; nearly all of the county population lies within the Grade A contour of KFMB-TV and San Diego is ranked by the American Research Bureau as the 54th market based on net weekly circulation. San Diego is presently served by five television stations, a construction permit has been issued for Channel 51 (KJOG), an application is pending for Channel 15, and the assignment of an additional UHF commercial channel to San Diego is under consideration in Docket No. 14229. Midwest alleges that respondents' CATV systems carry the signals of between six and nine Los Angeles television stations none of which stations provide measured or calculated Grade B service to more than the northern portion of the city of San Diego nor to any parts of six other separate communities adjacent to the city; that all of Mission's systems except Poway supply regularly eight Los Angeles stations beyond their calculated Grade B contours (Mission's Poway system carries three beyond Grade B signals and the independent Poway system carries two); that neither Poway nor Rancho Bernardo receive actual Grade B service from any Los Angeles stations; and that Southwestern supplies regularly to all of its subscribers at least three Los Angeles stations beyond their calculated Grade B contours.

3. Midwest goes on to allege that within the past year, and increasingly in recent months and weeks, there has been "widespread and intensive CATV activity within KFMB-TV's Grade A contour" and that service to Poway, Chula Vista and Pacific Beach was instituted only two to four months prior to the filing of the petition. It is alleged that the other systems have greatly extended their lines and substantially increased the number of subscribers since April of 1965; that the systems have increasingly emphasized the laying of lines, far out-



stripping the solicitation and hooking up of new subscribers, with cables being strung in some areas for miles with very few drops and in some cases none; and in those communities where the systems are operational or wired, only portions of such communities are involved. Midwest estimates that as of February 15, 1966, there were 17,000 homes in the county and within the station's Grade A contour connected to cable systems, of which approximately 6,500 were located in the city; that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are at present approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and this figure represents approximately 78% of all homes in the county within the Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are

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3/ (continued)

and is a management company. Trans-Video operates under contract the CATV systems owned by and franchised to Mission, Southwestern and Pacific.

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alleged to be in areas covered by CATV franchises. Because of the alleged emphasis on line extensions rather than on hook-ups, Midwest contends that a large number of new subscribers could be wired up in a relatively short time even if there were no further cable expansion.

4. Midwest contends that the importation of a multiplicity of distant signals will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience notwithstanding the non-duplication rules. Midwest points out that in its case, 44% of its programming is non-network and will be subject to duplication and that, with respect to the San Diego independent stations, nearly 100% of their programming

## App. 6

will be subject to duplication; that virtually all of the non-network recorded programs now under contract to the San Diego stations are also under contract or available to the Los Angeles stations; that the importation of such programs impairs their value to the San Diego stations and causes audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming; that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents; and analysis of the remaining 6% indicates that the same public interest is or would be served in an alternate way by the San Diego stations.

5. Midwest also alleges that respondents' systems, with the exception of Poway Cable TV, carry the signal of KFMB-TV on channel but materially degrade the quality of the signal broadcast, particularly the color signals; that the signal of the local UHF station, KAAR, is markedly worse on the cable than those of the VHF stations; that the signals of the Los Angeles stations appear better on the cable than those of the local stations despite the fact that the Los Angeles stations generally do not place a Grade B signal over San Diego; and that the effect of degradation has been not only to damage the local station's reputations but has placed the distant signals on a higher competitive level than the local signals.<sup>4/</sup> Finally, Midwest contends that in addition to the foregoing considerations, the CATV situation in San Diego falls squarely within the principle enunciated in the Second Report in footnote 69, where the Commission pointed out that, although, in general, CATV activity which does not involve extension of a signal beyond its Grade B contour may continue, an important exception exists where two major markets fall within one another's Grade B contours. In such a situation, the carriage by a CATV system in Baltimore, for instance, of the Washington signals might equalize the quality of the distant signals, change

the viewing habits of the local population and affect the development of local

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4/ Midwest states that because of degradation, the Pacific Beach system carries KFMB-TV on Channels 8 and 2, but that this dual carriage confuses the public, weakens its station identification and causes possible ratings losses.

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television stations. Midwest contends that the San Diego-Los Angeles situation is a classic illustration of this problem and that relief should be afforded on this basis as well as the basis previously set forth.

6. In view of the above, Midwest requests, essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondent be ordered to confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographic areas where the systems were operating on February 15, 1966.<sup>5/</sup> In a document filed on April 15, 1966, Jack O. Gross, holder of a construction permit for UHF station KJOG-TV, Channel 51, San Diego, supports the Midwest petition and states that a grant of the requested relief would materially contribute to the success of UHF in San Diego generally and KJOG in particular.

7. Mission's opposition, filed on behalf of Mission, Pacific and Trans-Video, contends that the Commission can only issue temporary relief in accordance with the provision of Section 312 of the Communications Act (47 U.S.C. 312(c)) and that there is no statutory authority for the type of relief requested. Mission contends that such relief is analogous to a motion for stay and that, as such, it is inadequate because Midwest has failed to show irreparable injury to itself (Mission



contends that Midwest's allegations in this regard are only conclusionary and not supported by material facts); has failed to demonstrate injury to the public (Mission contends that allegations in this regard are also conclusionary and highly speculative and denies that there is any degradation of the San Diego stations' signals by the CATV systems); and has not demonstrated that there is a likelihood that it will succeed on the merits (Mission contends that Midwest's allegations relating to a "pell-mell" extension of cable lines are completely unsupported by facts, is untrue, and that respondents have merely continued their normal wiring activity).

8. Mission alleges further that there is nothing in the rules which prohibits the actions of respondents which Midwest seeks to prevent since the rules speak of extension of signals to "new geographic areas" and Midwest has not factually supported its allegation that there has been such an extension. Further, Mission contends, Midwest has

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5/ In support of its request for temporary relief pending the outcome of any hearing, and in an attempt to describe the extent of respondents' operations in San Diego and southwestern San Diego county as of February 15, 1966, Midwest filed a Supplement to its petition, to which it attached a map purporting to show that there were eight separate islands of CATV subscriber service as of February 15, 1966 located in recognized geographical areas in San Diego which were further circumscribed by recognizable and known geographical limitations and boundaries within the larger geographical areas. In the Supplement, Midwest alleges that since February 15, 1966, the respondents have extended lines and service beyond the specific boundaries within the general areas and also into entirely new geographic areas.

failed to show that the signals extended are beyond predicted Grade B and it is Mission's position, in any event, that its Poway system is "grandfathered" under the rules since it was franchised under the San

Diego county franchise; service had commenced prior to March 17, 1966, and the county-wide franchise authorized CATV at any place in San Diego county outside of corporate limits.<sup>6/</sup> Mission states that the outside-of-corporate limits construction in San Diego has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Finally, Mission alleges, with respect to the request for temporary relief, that the public will be irreparably injured since it ignores the need for expansion of television service, prevents expansion of educational television, deprives the public of improved color reception, municipalities of revenues from CATV and potential subscribers of the same choice of programs that their neighbors who have already subscribed have; that respondents will be irreparably injured since their franchises may be forfeited if construction is delayed, contract rights may be lost, and respondents' employees may lose their jobs; the Commission's Rules are yet untested and are probably illegal; and the rights of Midwest or the public can be fully protected by a decision on the merits, after a hearing, if the Commission determines that any action is required.

9. As to Midwest's request for permanent relief, Mission incorporates its same arguments with respect to the request for temporary relief and contends further that its franchises were obtained before the Commission decided to exercise jurisdiction and that construction and installation of cable was started before February 15, 1966 or March 17, 1966. Additionally, Mission alleges that while CATV is a less expensive and more convenient type of antenna service for signals already present in San Diego, CATV is needed in certain areas in order to provide adequate reception of San Diego Channels 8 and 10 and that CATV expansion is necessary for the acceptance and viability of UHF stations. Mission points out that since the San Diego stations' programs cannot be duplicated on the same day and surveys show that



6/ Midwest had alleged, in its petition, that Mission's system in Poway had commenced operations after February 15, 1966 in violation of Section 74.1107 of the Rules, and requested that the Commission issue a cease and desist order as to said system. On April 6, 1966, after an independent inquiry, the Commission issued an Order to Show Cause why a cease and desist order should not be issued with respect to the Poway operation. FCC 66-292, April 6, 1966. On June 22, 1966, the Commission issued a Cease and Desist Order as to Mission's Poway system. FCC 66-548.

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during prime time the San Diego stations have 84% of the viewing audience, it does not appear that fragmentation of the remaining 16 to 20% of the television audience, among the four or five Los Angeles independents and the San Diego UHF, could have any serious impact on the ability of the San Diego network stations to continue their operations. Finally, Mission contends that the addition of subscribers to its systems after February 15, 1966, does not constitute extensions to new geographical areas since, under its city franchises, the appropriate geographic boundaries are the city limits and, under its county franchises, the appropriate boundaries are the unincorporated areas of the county.<sup>7/</sup> In view of all of the above, Mission requests that Midwest's petition, both as to temporary and permanent relief, be denied.

10. Southwestern filed an Opposition, a Motion to Sever, and a Motion to Dismiss.<sup>8/</sup> In its pleadings, Southwestern alleges that the petition must fail since Midwest has failed to show that its system is carrying beyond Grade B signals and that Southwestern's engineering studies show that the commercial television signals which it is carrying are all of Grade B intensity. Southwestern further contends that its system is "grandfathered" since it began operating prior to February 15, 1966, is not expanding throughout the entire community or into new

areas, and has only continued normal wiring operations. Moreover, Southwestern alleges that its system helps UHF and that while Midwest has submitted no probative data regarding impact, Southwestern's market study, a copy of which it attached as an exhibit to its opposition, shows that CATV helps UHF generally and Channel 39 specifically since carriage of the UHF station on the cable increases the station's audience, improves its picture quality, and provides greater penetration for, and viewing frequency of the station. Southwestern also points out that Midwest's claim of signal degradation does not relate to its system since it has always carried Midwest's station on channels 8 and 2 of the cable. Southwestern also claims that its franchise area is unique since the residents and antennas in that area are oriented to the Los Angeles stations and since it is within the predicted or measured Grade B contours of the commercial signals of the stations carried on its system. Southwestern contends that Midwest's showing of fragmentation has no applicability

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7/ Mission submitted a map with its opposition showing the area of each franchise; the portion of each franchise receiving service prior to February 15, 1966; the portion of each franchise receiving service after February 15, 1966; and the portion of each franchise which was "fielded" and/or under construction as of April 12, 1966.

8/ Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order.

to its system since the survey was conducted in a part of San Diego where the off-the-air reception of the Los Angeles stations is of less quality, the survey was conducted prior to the commencement of service by Southwestern and the various sections of San Diego vary significantly, and the audience survey findings relate to areas of San Diego where the CATV systems carry the full schedules of the Los Angeles

CBS and NBC stations while Southwestern's system carries only the San Diego CBS and NBC stations. Finally, Southwestern alleges that while Midwest has failed to show that it would be irreparably injured by denial of the temporary relief, Southwestern would suffer irreparable injury since a grant of temporary relief would dry up Southwestern's financing and cause bankruptcy. As to the request for permanent relief, Southwestern contends that while Midwest has essentially requested the Commission to designate a "Carroll" type issue, it has completely failed to furnish detailed evidentiary material. Accordingly, Southwestern requests that it be severed from the other respondents and that the petition and supplement, insofar as they relate to it, be denied or dismissed.

11. Rancho Bernardo, in its opposition, states that it operates a system in northern San Diego under a franchise from the city of San Diego and that the system is part of a housing development of 5,400 acres, approximately 400 acres of which have been developed. The system is designed to serve only the residential community and there is no intention of extending beyond those boundaries. Rancho Bernardo states that there are now approximately 1,000 subscribers to the system or 99% of the occupied housing units and service is expanding in an orderly fashion to serve all the new residential units with the timing of service extension being determined solely by the sales of residential units. Rancho Bernardo contends that the area receives unsatisfactory off-the-air television reception, is not within the Grade A contour of KFMB-TV, and may be within the Grade B contours of some Los Angeles stations. Rancho Bernardo denies that it degrades the KFMB signal and alleges that a grant of temporary relief would irreparably injure it because it would impede the sales of homes and would not help KFMB since it would make its signal unavailable in the area. Rancho Bernardo requests denial of the temporary and permanent relief and asks that it be dismissed from the proceedings.



12. In its responsive pleadings, Midwest points out that there is no factual dispute as to Mission's and Southwestern's intentions to continue expansion throughout the various geographic areas covered by their franchises. Midwest contends that temporary relief is necessary to prevent this great expansion of these major market systems until resolution of the public interest questions presented. Midwest alleges that, similarly, with limited exceptions, there is no real dispute as to the regional and specific geographic areas described by it; that since respondents have not wired up all of the homes within the specific geographic areas designated, restriction to such areas, pendente lite, would not prevent normal wiring operations; and that, therefore, there is no showing by respondents that an interim stay would impair the ability

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of the systems to continue operations. Midwest alleges that Mission makes no claim that its viability would be impaired and that Southwestern's claim of irreparable injury assumes a total prohibition against new subscribers; Southwestern does not claim that if it were limited to new subscribers within the specific geographic areas designated as of February 15, 1966, it would be irreparably injured.

13. Specifically, with respect to Mission, Midwest alleges that it has offered no factual information to refute the allegations of rapid line expansion; that Mission's map, in large part, confirms the boundaries specified by Midwest and, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966; that Mission's arguments regarding need for CATV service are invalid because 1) the entire public will lose if the local stations are forced off the air or required to curtail operations and 2) over 94% of the Los Angeles stations' programs have been, are, or will be essentially duplicated by the programming of the San Diego stations;

and that irreparable injury to Mission's systems has not been demonstrated since 1) there has been no showing that Mission's systems were not viable as of February 15, 1966, 2) there has been no showing that its franchises or contracts will expire or be forfeited if interim relief is granted (Midwest points out that the franchises do not require carriage of the Los Angeles stations and that the systems could expand without restriction carrying only San Diego signals); and 3) employee lay-off would occur only if respondents were ordered to halt all normal wiring and hook-up of new subscribers, but this has not been requested. Mission's county-wide grandfathering argument, contends Midwest, completely ignores the meaning of paragraph 149 of the Second Report and Order.

14. Midwest alleges, in response, that Southwestern does not challenge Midwest's designation of appropriate geographic areas and that since there are thousands of residents in these areas not yet on the cable, a grant of temporary relief as to Southwestern would not halt its normal wiring activities (Southwestern claims about 900 subscribers at present). Further, Midwest alleges, Southwestern's argument as to being "grandfathered" in the entire franchised area, because it was serving 350 subscribers on February 15, 1966, completely ignores the import of the Second Report and Order; Southwestern's attempt to show that its franchised area receives Grade B signals from Los Angeles is completely inadequate from an engineering standpoint and its market survey techniques are defective and its conclusions unsupported.<sup>9/</sup> Finally, Midwest contends

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<sup>9/</sup> Midwest points out that while cable subscribers interviewed had two UHF stations available to them (Channel 28, Los Angeles, and 39, San Diego) the Los Angeles UHF is not available off the air, and the survey only proves, at most, that viewers with two available UHF stations to watch, will view UHF 1.77 times as much as viewers with one, and that, if UHF viewing by cable subscribers is divided equally between the two stations, Channel 39 is viewed 11% fewer times in cable homes than in



non-cable homes. Midwest also pointed out that the survey proved nothing as to reception quality on cable since no distinction was made between Channels 28 and 39 and it was not determined whether the non-cable homes surveyed had UHF antennas.

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that while Southwestern's allegations concerning impact relate to the short run benefits to UHF of carriage on CATV, these benefits decrease as penetration of all-channel receivers increases and that Southwestern has set forth no basis for being treated differently than the other respondents in this proceeding.<sup>10/</sup> As to Rancho Bernardo, Midwest states that in light of the representations as to extension Midwest will not press its request for temporary relief. However, Midwest contends that no basis has been shown for dismissal of Rancho Bernardo from the proceeding; that dismissal of Rancho Bernardo would have the effect of grandfathering an area 1350% larger than the area in which service is presently being rendered; and that no allegation has been made that Rancho Bernardo's participation would constitute a hardship to it or cause it damage.

15. With respect to its request for permanent relief, Midwest states that the real issue is whether CATV should be allowed to import distant signals which would result in impairing the service capabilities of network stations and threaten the continued existence of commencement of UHF stations; that carriage provides only short-run benefits to UHF stations; and that same-day non-duplication is insufficient because it has little relevance to non-network programs. In conclusion, Midwest requests that the Commission set the matter for hearing on the issues raised in the petition for permanent relief; that pending final disposition, the respondents be directed not to extend the Los Angeles stations' signals beyond the boundaries previously specified; and that Southwestern's motion to dismiss the petition for temporary relief and

Rancho Bernardo's petition to be dismissed from the proceeding be denied.

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10/ Southwestern, in its responsive pleadings, repeats its allegations that its franchise area does receive Grade B signals from Los Angeles and that its system does not degrade the signals of KFMB-TV. It also attached a supplementary economic report purporting to show that CATV carriage does help UHF generally and Channel 39 specifically.

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16. We think Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area. At paragraph 149 of the Second Report and Order (2 F.C.C.2d 725), after stating our policy with respect to "grandfathering" the existing operations of CATV systems, we stated:

"We turn now to the question whether systems extending signals beyond their Grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographic areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing). While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, ap-

propriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and response in the particular case, whether such temporary relief is called for, and if so, its nature."

This case falls squarely within the terms of the policy stated above. There is considerable UHF activity currently under way in San Diego with KAAR (d. 39) in operation until November, 1965, with an application pending for educational Channel 15, with an outstanding construction permit for Channel 51 (KJOG-TV) and plans to commence operation in the near future. Several of Mission's systems, and Southwestern's system, commenced operations only some two to four months prior to the filing of the petition herein. In view of the size of the area involved (approximately 380,000 housing

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units in San Diego County), while the respondents' systems have relatively few subscribers, pursuant to their franchises, they have the potential for expanding throughout the entire county.

17. In this latter connection, Midwest has pointed out, and respondents have not denied, that there were on February 15, 1966, approximately 17,000 CATV subscribers in the county and within KFMB-TV's Grade A contour, of which approximately 6,500 were located in San



Diego. It was further pointed out that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and that this represents approximately 78% of all homes in the county within the station's Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are located in areas covered by CATV franchises. Mission states that construction in unincorporated communities in San Diego County has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Thus, it clearly appears that a hearing is required with respect to the over-all question of whether such potential expansion in this major market is consistent with the public interest. Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for.

18. A hearing is also appropriate here because of the number of unresolved issues present. For instance, there is disagreement as to whether some of respondents' systems are operating within the predicted Grade A contour of KFMB-TV; there is controversy as to whether some of the respondents' systems operate within the Grade B contour of some of the Los Angeles stations carried on the system (but in this respect, see also par. 19, infra.); there is a serious question as to

whether respondents' systems degrade the San Diego signals carried and particularly the signals of KFMB-TV; the degree of CATV penetration of the market is contested; and, of course, there is controversy as to whether carriage on the systems will help or hurt new or prospective UHF stations in San Diego. These issues are all particularly appropriate for resolution in an evidentiary hearing. We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on all of these matters.

19. Some of the respondents have alleged that since their systems operate within the predicted or measured Grade B contours of the Los Angeles stations carried on their systems, the provisions of paragraph 149 of the Second Report, *supra*, which relate generally to extension of beyond Grade B signals, do not apply to their systems and that they may, therefore, continue to expand without hindrance. This contention, however, misconceives the main thrust of our major market

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policy. The Commission's primary concern with respect to CATV operations in the major markets importing distant television signals was whether such operation "may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial competition of a patently unfair nature" (Second Report, Paragraph 139). We defined "distant signals" as those signals extended or received beyond the Grade B contours of those stations. While this standard will generally encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means a fixed and immutable standard to which we will blindly adhere. As we pointed out in the Second Report, CATV activity which does not involve extension of a signal beyond the Grade B contour may continue, ". . . with possibly only



the rarest exception . . . ." (Second Report, paragraph 151). This exception involves a situation where, for instance, two major markets fall within one another's Grade B contours and the importation of signals of the stations in one market into the other would equalize the quality of the distant signals, possibly change the viewing habits of the latter community and affect the development of independent UHF stations there. Assuming, arguendo, as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations, this is exactly the situation presented here. The Los Angeles stations are located more than 100 miles from the San Diego main Post Office and, while they may provide service to some parts of San Diego, the issue is what kind of service as compared to that of the local San Diego stations, and what is the effect on the latter of CATV which "equalizes" the technical quality of the local San Diego signals and the more than 100 mile distant Los Angeles stations. Thus, the problem is not resolved merely by a showing that the Los Angeles stations do provide Grade B signals to parts of San Diego County.

20. It is clear, therefore, that a hearing is necessary with respect to the overall question of CATV expansion in this major market and that some form of temporary relief is necessary and appropriate "before consequences possibly adverse to the public may develop." Before discussing the nature and form of the temporary relief to be prescribed, there are three matters raised by respondents which we will briefly discuss.

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21. First, respondents Mission and Southwestern Contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any

sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303(f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see Federal Trade Commission v. Dean Foods Co., \_\_\_ U.S. \_\_\_, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See Public Service Commission v. Federal Power Commission, 327 F.2d 893, 896-897 (C.A.D.C., 1964).

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president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, pendente lite, if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional sub-

scribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.<sup>12/</sup> We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

22. The question now is the nature and form of the temporary relief to be afforded. In its petition, and particularly the supplement thereto, Midwest specified with great particularity and precision "eight separate and discreet islands of CATV subscriber service as of February 15, 1966," alleging that these "islands" were located in recognized geographical areas in San Diego and that the islands were further circumscribed by recognizable and known geographical areas. These latter areas were also described with great precision and it was alleged



that from the eight islands, as they existed on February 15, 1966, the respondents have extended and are continuing to extend their lines and service beyond the boundaries within the geographical areas which they partially occupied and, also, into new geographical areas. Midwest asks essentially, that pending final disposition, respondents, be ordered to confine delivery of Los Angeles signals to subscribers located within the geographical boundaries inside of the eight general area which circumscribe the areas where the systems were operating on February 15, 1966. <sup>13/</sup>

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12/ We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

13/ Midwest has indicated in a subsequent pleading that it does not object to dismissing Poway Cable TV from the proceeding and that it is not pressing its request for temporary relief as to Rancho Bernardo. Accordingly, we are only concerned with framing temporary relief as to Mission's and Southwestern's systems.

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23. Neither Mission nor Southwestern has factually challenged Midwest's description and specification of the geographic areas and their boundaries. Rather, they take the position that their franchise areas constitute the appropriate geographic limitations. We have, however, rejected this contention (see paragraph 21, supra). Mission, with its opposition, submitted a detailed map which, in part, indicates for the entire area where systems were operating on February 15, 1966. Midwest states in its reply that the map, in large part, confirms the boundaries specified by it in its supplement and that, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966. We have also reviewed the map and compared it

with the specific boundaries detailed in Midwest's supplement and it appears that, with the exception of the Chula Vista area, the parties are largely in agreement as to the boundaries of the areas where Mission was operating on February 15, 1966.

24. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Mission to confine delivery of the Los Angeles signals carried on its systems to subscribers within those areas where Mission indicated in its map (appended as attachment G to its opposition) it was operating on February 15, 1966. We will also accept Mission's map designation with respect to the Chula Vista area, provided, however, that our action with respect to Chula Vista is without prejudice to any further showing Midwest may present to support its position as to the geographic boundaries, as of February 15, 1966, of the area served by Mission's Chula Vista system. Upon an appropriate showing, we will give further consideration to Midwest's request to further restrict the Chula Vista system pending final disposition of this proceeding.

25. As to Southwestern, we have previously noted that it has not challenged Midwest's designation of the general and specific areas within which it was operating on February 15, 1966. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Southwestern to confine delivery of the Los Angeles signals carried on its system to subscribers within those areas specified by Midwest in its supplemental petition (paragraphs (A) (1) and (B)(1), pages 10 and 12, respectively, and affidavit, paragraph 5(1), pages 2 and 3), appended thereto. This action will be subject to any further showing Southwestern may wish to present to show that the geographic boundaries of the area in which it was operating as of February 15, 1966, differ from these specified by Midwest. Upon an appropriate showing and request, we will give further consideration to the question of appropriate February 15, 1966, boundaries of Southwestern's systems.



26. It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwestern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana

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signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the Second Report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a roll back is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

27. Accordingly, in view of the above, and pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules, IT IS ORDERED, that this proceeding is hereby DESIGNATED FOR HEARING, at a time and place to be specified in a further order, upon the following issues:

1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of

subscribers per half mile (or other comparable convenient unit of measure) of cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.

2. To determine whether the signals of any of the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.
3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.
4. To determine the present penetration of CATV service by CATV systems in the San Diego market area and the potential penetration of CATV service under conditions of unlimited expansion.
5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.
6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.
7. To determine whether any conditions of future import should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

8. To determine whether expansion of any of respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission.

IT IS FURTHER ORDERED, that Midwest Television, Inc. the Chief, Broadcast Bureau, Mission Cable TV, Inc., Southwestern Cable Company, Pacific Video Cable Company, Inc., Trans-Video Corp., Rancho Bernardo Antenna Systems, Inc., and Jack O. Gross, are made parties to this proceeding.

IT IS FURTHER ORDERED, that respondents have the burden of proceeding and the burden of proof with respect to issue 1; that with respect to issue 2, petitioners have the burden of proceeding and the burden of proof; that respondents have the burden of proceeding and the burden of proof with respect to issue 3; that respondents have the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to respondents' respective CATV systems, and that petitioner has the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to CATV systems other than those of respondents; that petitioner has the burden of proceeding and the burden of proof with respect to issues 5 thru 8.

IT IS FURTHER ORDERED, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. ARE DIRECTED TO LIMIT the operations of their respective CATV systems as set forth in paragraphs 24-26, supra.

IT IS FURTHER ORDERED, that the Motion to Dismiss filed by Poway Cable Television IS GRANTED and it IS DISMISSED as a party to this proceeding.

IT IS FURTHER ORDERED, that the Motion to Sever and the Motion to Dismiss filed by Southwestern Cable Co. and the Petition to be dismissed filed by Rancho Bernardo Antenna Systems, Inc., ARE DENIED.

IT IS FURTHER ORDERED, that the request for oral argument of Mission Cable Television, Inc., Pacific Video Cable Co., Inc. and Trans-Video Corp. IS DENIED.

IT IS FURTHER ORDERED, that the petition filed by Midwest Television, Inc., and the supplement thereto, to the extent indicated above, IS GRANTED, and, in all other respects, IS DENIED.

IT IS FURTHER ORDERED, that, to avail themselves of the opportunity to be heard, the parties herein, pursuant to Section 1.221(e) of the Commission's Rules, in person, or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate a written appearance stating their intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, that the ruling as to temporary relief shall be effective on the 3d day, not counting Saturdays, Sundays and holidays, after the day of release of this opinion, provided that, the ruling on temporary relief shall not be effective until judicial determination of the motion for a stay in the case of any respondent which notifies the Commission within two days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this opinion.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple  
Secretary

Adopted: July 20, 1966

Released: July 25, 1966



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[Caption Omitted]

ERRATUM

In the Commission's Memorandum Opinion and Order in the above-entitled proceeding, released July 25, 1966, FCC 66-683, 86403, paragraph 21 is corrected to read as follows:

"21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined

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in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303(f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see Federal Trade Commission v. Dean Foods Co., \_\_ U.S. \_\_\_, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a sub-



ject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See Public Service Commission v. Federal Power Commission, 327 F.2d 893, 896-897 (C.A.D.C., 1964). Second, respondents Mission and Southwest contend that their systems are "grandfathered" to the limits of their franchises. We reject this position since it is totally inconsistent with the policy expressed in paragraph 149 of the Second Report (see, also, Letter to Telerama, Inc., 3 FCC2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury<sup>11/</sup>. Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice-president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, pendente lite, if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers

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and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.<sup>12/</sup> We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

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11/ Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

12/ We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple  
Secretary

Released: July 26, 1966

[SEAL]

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BRIEF FOR INTERVENORS MIDWEST TELEVISION, INC.  
(KFMB-TV), JACK O. GROSS (KJOG(TV)), AND  
SAN DIEGO TELECASTERS, INC. (KSAH)

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

**Case No. 21,183**

SOUTHWESTERN CABLE Co., *Petitioner,*

*v.*

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

**Case No. 21,192**

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE Co., and  
TRANS-VIDEO CORP., *Petitioners,*

*v.*

UNITED STATES OF AMERICA

and

FEDERAL COMMUNICATIONS COMMISSION, *Respondents.*

**FILED**  
PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

NOV 7 1966

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IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

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Case No. 21,183  
SOUTHWESTERN CABLE Co., *Petitioner*,  
*v.*  
UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.

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Case No. 21,192  
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE Co., and  
TRANS-VIDEO CORP., *Petitioners*,  
*v.*  
UNITED STATES OF AMERICA  
and  
FEDERAL COMMUNICATIONS COMMISSION, *Respondents*.

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ON PETITION FOR REVIEW OF MEMORANDUM OPINION AND ORDER  
OF THE FEDERAL COMMUNICATIONS COMMISSION

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BRIEF FOR INTERVENORS MIDWEST TELEVISION, INC.  
(KFMB-TV), JACK O. GROSS (KJOG(TV)), AND  
SAN DIEGO TELECASTERS, INC. (KAAR)

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**JURISDICTIONAL STATEMENT**

These cases were brought by two petitions for review of a Memorandum Opinion and Order (FCC 66-6837) released July 25, 1966,<sup>1</sup> by respondent Federal Commu-

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<sup>1</sup> Corrected by an Erratum released July 26, 1966.

nications Commission (hereinafter "FCC" or "Commission") in a proceeding before the Commission, *In the Matter of Midwest Television, Inc. (KFMB-TV)*, Docket No. 16786. Petitioners in this Court are some of the respondents in the proceeding before the Commission. Petitioners invoke this Court's jurisdiction under Section 402(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 402(a), and the Judicial Review Act of 1950, as amended, 5 U.S.C. §§ 1031-42. By order of the Court dated August 23, 1966, the two cases were consolidated for all purposes.

This brief is submitted jointly by Midwest Television, Inc. ("Midwest"), San Diego Telecasters, Inc. ("Telecasters"), and Jack O. Gross ("Gross"). By an order dated August 23, 1966, the Court granted the motions of Midwest, Telecasters, and Gross for leave to intervene in this proceeding. Intervenors support the position of respondents.

#### **COUNTER STATEMENT OF THE CASE**

Petitioners own and operate a number of CATV systems in and around San Diego, California. Southwestern Cable Co. ("Southwestern"), petitioner in No. 21,183, owns a CATV system operating in a section of San Diego. Petitioners in No. 21,192 are related companies. Mission Cable TV, Inc., operates several CATV systems in the San Diego area and holds franchises to operate other CATV systems. Pacific Video Cable Co. ("Pacific") owns CATV systems operating in and around El Cajon, California, a city very near San Diego. Trans-Video Corp. ("Trans-Video") is majority owner of Mission Cable TV, Inc., and sole owner of Pacific. It also operates the CATV systems owned by its subsidiaries and by Southwestern. Peti-

tioners in No. 21,192 will generally be referred to collectively as "Mission."

Intervenors Midwest and Telecasters operate television stations in San Diego: respectively, KFMB-TV, Channel 8, a CBS affiliate, and KAAR, Channel 39, a UHF station not affiliated with a national television network. Intervenor Gross holds a permit from the FCC to construct another UHF television station, KJOG-TV, on Channel 51 in San Diego; it would also be unaffiliated. The San Diego area also receives off-the-air television service from three other stations, KOGO-TV, Channel 10, affiliated with NBC, XETV, Channel 6, an English-language ABC affiliate which operates in Tijuana, Mexico, just across the border from San Diego, and XEWT, Channel 12, a Spanish-language station in Tijuana. Finally, an application is pending at the FCC for authorization to construct a non-commercial educational television station on Channel 15 in San Diego, and the Commission is considering assignment of an additional UHF commercial channel to San Diego. (R. 579)

Thus, the San Diego area now receives, off the air, the signals of five local or area television stations, one of them broadcasting in Spanish; it should soon receive two more local signals off the air, one of them educational, and it might have an eighth channel allocated to the area by the FCC. Only three other California television markets—Los Angeles, San Francisco and Sacramento-Stockton—and very few other markets throughout the United States have more allocated channels than San Diego now has.<sup>2</sup> There are approximately 470,000 television households in the San Diego market, as compared with well over 3 million in the Los

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<sup>2</sup> See 47 C.F.R. § 73.606(b).

Angeles market, well over 11½ million in the San Francisco market, and nearly 900,000 in the Sacramento-Stockton market.<sup>3</sup>

Petitioners' CATV systems carry the signals of most or all of the seven VHF stations operating in Los Angeles. They also carry the signals of the four English-language stations operating in the San Diego area. This means that among residents of the San Diego area who are not CATV subscribers there are essentially four television stations seeking viewership. Among CATV subscribers, viewership is dissipated among up to eleven stations.

Midwest initiated the proceeding before the Commission by filing a petition, pursuant to the Commission's CATV rules,<sup>4</sup> which in substance requested the Commission to limit, *pendente lite* and then permanently after hearings, any further expansion by petitioners' CATV systems insofar as they carry Los Angeles signals. Pursuant to the rules the allegations in the petition were supported by affidavits. (R. 1-56, 121-44) Intervenor Gross promptly filed in full support of the petition (R. 186-91) and intervenor Telecasters, by a letter submitted with a later Midwest pleading (R. 506-17), also expressed its support. Intervenor Gross was made a party to the proceeding (R. 594), and intervenor Telecasters moved to be made a party after the record was certified to the Court.

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<sup>3</sup> Television household data taken from Television Factbook No. 36, published by Television Digest, Inc., Washington, D. C., 1966, pp. 38-a, 39-a.

<sup>4</sup> 47 C.F.R. §§ 74.1101-09. The Counterstatement of Facts contained in the brief of respondents adequately describes these rules and the events leading to their adoption.



The petition, affidavits, and other filings showed that if the CATV systems were allowed to continue to expand, the San Diego area would be flooded with Los Angeles signals, thus severely fragmenting the audience of the San Diego stations, both present and proposed. It was shown further that since a television station's revenues are directly related to its audience the revenues of the San Diego stations would be impaired by this audience fragmentation. The result, it was shown, would be an impairment of the ability of the existing stations to operate in the public interest and of the ability of the unborn stations to come on the air and develop effective programming. This result would be detrimental to the public interest, it was shown, because those who did not or could not subscribe to CATV would receive no compensation for a loss of existing or potential television service, and those who were subscribers would lose existing and potential locally originated programming with little real program variety received in exchange.

After study of Midwest's petition and supporting affidavits, and after reviewing voluminous additional pleadings and data submitted by all the parties (R. 121-44, 186-91, 194-263, 265-328, 330-62, 377-84, 388-400, 404-500, 506-57), the Commission issued the Memorandum Opinion and Order being reviewed here. (R. 577-98) The Commission concluded that "Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' [petitioners here] CATV systems throughout the San Diego market area." (R. 587) Accordingly, it designated the matter for evidentiary hearing. The Commission also said:

"Further, unless this expansion is appropriately limited pending resolution of the issues, within a

very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for." (R. 588)

The interim order the Commission entered did not require petitioners to disconnect a single subscriber. Instead, the order required that pending completion of the Commission proceedings petitioners are not to add new subscribers, with two exceptions. New lines may be built and new subscribers added in any area (as indicated on certain maps) in which any of petitioners' CATV systems was operating on February 15, 1966 (the effective "grandfather" date for CATV systems that were operating when the Commission's CATV rules were issued). Also, new lines may be built and new subscribers added in any other area so long as only San Diego area stations are carried. (R. 592-94)

Petitioners then brought the Commission's interim order here for review. They also sought a stay of the order pending disposition by the Court of these proceedings. By order dated August 23, 1966, the Court stayed the Commission's order pending disposition of these proceedings insofar as it would preclude petitioners from adding new subscribers to their trunk and feeder lines in existence on the date of the order. Thus, the only restraint under which petitioners now operate

is that new trunk and feeder lines may not be built to carry Los Angeles signals in areas where petitioners' CATV systems were not operating on February 15, 1966.

#### SUMMARY OF ARGUMENT

1. The Commission has the power to issue the interim order being reviewed here, and no rights of petitioners were violated. The order is an interim order designed to prevent a major departure from the status quo while the Commission proceeding goes forward. The order was not issued under Section 312 of the Communications Act, and the Commission was not required to follow the procedures set forth in that section. However, the procedures that were followed were fair. Petitioners were on notice of the issues. They exercised the opportunity to respond. In short, they have been heard.

The Commission's power to issue the order derives from Section 4(i) of the Communications Act, which grants the Commission authority to make such rules and issue such orders, not inconsistent with the Act, as may be necessary in the execution of the Commission's function of regulating the communications industry in the public interest. Prior court of appeals decisions construing almost identical language in the Natural Gas Act, and another decision upholding the power of the SEC to issue an interim order in analogous circumstances, show that Section 4(i) gives the Commission the power to issue the order being reviewed. The two cases petitioners rely on are plainly distinguishable and do not suggest a different result.

2. The Commission's findings support the interim order. They show that the essential criterion—the public interest—has been satisfied, and the administrative

agency's judgment on this public interest question is entitled to great weight.

In adopting the underlying CATV rules, the Commission found that CATV systems carrying distant signals posed a threat to the viability of existing and potential television broadcast service, particularly UHF, with consequent harm to the public interest. It devised a regulatory program designed to permit examination of this problem in advance, generally in an evidentiary hearing, before CATV systems became entrenched, in view of the difficulty of attempting to "roll back" the situation at the conclusion of a hearing. It accordingly established procedures under which, upon a proper showing, it could issue interim orders to preserve the status quo while the hearing proceeded.

After reviewing the pleadings, affidavits, and other documents filed in the proceeding below the Commission concluded that they presented "a classic case for a hearing" on the public interest questions involved in carrying Los Angeles signals on CATV systems in the San Diego area. It also found that expansion of petitioners' CATV systems while the proceeding was underway, which could well occur if permitted, could frustrate the Commission's attempt to resolve the public interest questions. These findings and conclusions adequately support the issuance of the interim order under review, the Commission not being required to find further that intervenor Midwest would be irreparably injured if the interim order were not entered.

3. Petitioners' CATV systems are subject to the regulatory authority of the FCC under the Communications Act. CATV is interstate communication by wire or radio, to which the Act applies. The Commission's statutory powers with respect to television provide the

basis for regulating CATV to ensure that CATV communications operations are consistent with, and not harmful to, the television allocations plan which the Commission has established and the Congress has supported. The Commission's authority is not confined to regulation of communications common carriers and licensing of radio stations. It may regulate an entity within its statutory jurisdiction, which includes CATV systems, to promote the overall objectives of the Communications Act. Unregulated CATV can frustrate those objectives and the Commission is not powerless to prevent that result. Finally, CATV systems are not mere "master antennas" and cannot avoid being regulated on that ground.

4. Neither the order under review nor the CATV rules violate the First Amendment. CATV systems are subject to FCC regulation designed to avoid frustration of the national goal of local and area television broadcast service. Television stations are likewise subject to FCC regulation to promote the same goal and are subject to the placing of limits on their ability, whether directly or indirectly, to extend their signals beyond specified areas. Such regulation does not violate the First Amendment, and CATV systems can claim no greater constitutional rights than the stations whose signals they carry. The Commission is not regulating program content in either case. Moreover, regulation of communications systems, when it does not regulate program content, does not depend for its constitutional validity upon the scarcity of radio frequencies; several types of such regulation are valid and have nothing to do with radio frequencies. Finally, the decision in *Weaver v. Jordan* is not applicable.

5. Lastly, the adoption of Section 74.1109 of the CATV rules did not violate the notice requirement of



the Administrative Procedure Act. The argument petitioners make on this point was not raised before the Commission and should be rejected by the Court. Also, the notice of proposed rule making put petitioners on notice that their carrying of Los Angeles signals in the San Diego area might be limited by Commission rules. Moreover, petitioners did have notice of a proposal very much like Section 74.1109 through comments filed in the rule making proceeding.

### ARGUMENT

#### **I. THE COMMISSION HAS THE POWER TO ISSUE THE INTERIM ORDER BEING REVIEWED HERE, AND NO RIGHTS OF PETITIONERS WERE VIOLATED.**

Initially, it should be pointed out that the Commission could have adopted the request of various parties in the CATV rule making proceeding and issued a general rule freezing CATV expansion completely. Alternatively, it could have frozen CATV expansion by general regulations or policies which made provision for new or expanded CATV operations only in carefully defined and limited situations. The rules and policies which the Commission did adopt and which are challenged here do not go that far, and CATV has been given many more rights and far more opportunity than was required. The Commission established a scheme of CATV regulation which is implemented by a series of individual determinations, with the burden in some instances on the broadcaster and in some instances on the CATV operator to initiate action at the Commission to vindicate the public interest. Vital to this approach are those provisions of the Commission's rules which permit it to take interim action while it is deciding whether to proceed or while a proceeding is pending before it. Since the Commission could have

established a system of regulation far more rigid, far more inflexible and far more restrictive, insofar as petitioners are concerned, it is important to consider petitioner's arguments with respect to the Commission's interim order in this context. It would be ironic indeed if a system of regulation which is less restrictive were to fail when, as will be shown below, the Commission's authority to regulate CATV is clear and when a broad system of prohibitory rules would have affected the petitioners more sharply and more directly than the interim order being reviewed.

**A. Section 312 of the Communications Act Is Not Applicable to the Issuance of the Order Under Review.**

Petitioners first argue that the Commission's interim order is illegal because the Commission did not comply with Section 312(b)-(c) of the Communications Act, 47 U.S.C. § 312(b)-(c).<sup>5</sup> The argument misconceives the basis and function of the Commission's order.

Section 312(b) authorizes the Commission to order a person to cease and desist from failing to operate substantially as set forth in his license or from violating statutory or regulatory provisions. Sections 312(c)-(e) prescribe, either explicitly or by reference to the Administrative Procedure Act, the procedures to be followed in proceedings for the issuance of cease and desist order.

The order under review is not a cease and desist order issued under Section 312. The proceeding

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<sup>5</sup> The argument on the Commission's power to issue the interim order is set out in the brief of Southwestern, petitioner in No. 21,183, and is incorporated by reference in the Mission brief. The other arguments are set out in the latter brief and incorporated by reference in the brief of Southwestern.

in which the order was entered was not an enforcement proceeding. The Commission did not base the order on a finding that petitioners were in violation of any statute, rule, or regulation.<sup>6</sup> The procedures followed by the Commission did not derive from Section 312, and the Commission did not purport to act under that section.<sup>7</sup>

Therefore, the Commission was not required to follow the procedures of Section 312 in issuing the interim order. The order was grounded on Section 4(i) of the Communications Act, 47 U.S.C. § 154(i). It is either a proper order under Section 4(i) or it is not. As will be seen below, Section 4(i) authorizes the Commission to issue such orders as may be neces-

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<sup>6</sup> Since issuing the CATV rules the Commission has proceeded against several CATV systems for operating in violation of the rules. Unlike the case here, those proceedings were cease and desist proceedings within the meaning of Section 312 and were treated as such. *E.g.*, Jackson TV Cable Co., Docket No. 16711, 4 F.C.C.2d 979 (1966); TeleSystems Corp., Docket No. 16666, 4 F.C.C.2d 628 (1966); Booth American Co., Docket No. 16635, 4 F.C.C.2d 509 (1966); Mission Cable TV, Inc., *et al.*, Docket No. 16575, 4 F.C.C.2d 236 (1966); Buckeye Cablevision, Inc., Docket No. 16551, 3 F.C.C.2d 798 (1966).

<sup>7</sup> If the order under review had been issued under Section 312, petitioners would be in the wrong forum. Jurisdiction to review such orders is vested exclusively in the United States Court of Appeals for the District of Columbia Circuit. Communications Act, Sec. 402(b)(7), 47 U.S.C. § 402(b)(7). Some of the cease and desist proceedings referred to in note 6, *supra*, have been appealed, all to the United States Court of Appeals for the District of Columbia Circuit. Jackson TV Cable Co. v. FCC, No. 20468; TeleSystems Corp. v. FCC, No. 20387; Booth American Co. v. FCC, No. 20367; Buckeye Cablevision, Inc. v. FCC, No. 20274. The petitions to review which instituted the instant proceedings were filed under Section 402(a) of the Act, 47 U.S.C. § 402(a), which governs review of FCC orders other than those appealable under Section 402(b).

sary in the execution of its functions. If Section 4(i) does not authorize the interim order of the Commission, that is the end of the case. If it does authorize the order, the Section 312 argument of petitioners is quite irrelevant.

Moreover, the Commission's temporary order is intended to prevent a major departure from the status quo and intended to do this not only as a matter of form but as a matter of substance. Petitioners were not required to stop carrying any signals they are carrying to any subscriber. They were not required to withdraw service from any subscriber. In fact, they were not in general prohibited from installing new service to new subscribers in the areas in which they were already operating. All that the interim order did was to restrict the *extent* of petitioner's expansion until the conclusion of the proceeding pending before the Commission.

Since the order was not issued under Section 312 the Commission was under no obligation to adhere to the procedures therein established. But the Court should note that the Commission in fact afforded petitioners extensive procedural protection. Petitioners were served with and were therefore fully aware of the allegations of Midwest's petition and the facts in the supporting affidavits. Their voluminous responsive pleadings, with many supporting affidavits, attest to the opportunity given them to be heard on Midwest's allegations. It is true that there was no *oral* hearing. Even if the order being reviewed were a final order this lack would not necessarily be fatal.<sup>8</sup> But the

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<sup>8</sup> See *FCC v. WJR*, 337 U.S. 265 (1949); *American Broadcasting Co. v. FCC*, 179 F.2d 437, 442 (D.C. Cir. 1949).

order is not final. It does not purport to settle the rights of the parties. It is an interim order. It is designed to preserve, to an extent, the existing situation during the pending proceedings because the Commission concluded that unlimited expansion by petitioners while the proceedings are pending could result in "consequences possibly adverse to the public . . . ."

Petitioners have received fair treatment. They have been heard in all matters they wished to bring to the Commission's attention. Their claims of violation of their "statutory rights" should be rejected.

**B. Authority To Issue the Order Under Review Derives From Section 4(i) of the Communications Act.**

Petitioners also assert that apart from Section 312 the Commission is without power to issue interim orders like the order under review. In view of the broad grant of power in Section 4(i) of the Act and the relevant case law, this argument must also fail.

In Section 4(i) the Commission is authorized to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." This grant of power is broad enough to authorize the order under review, and it was just such broad power that Congress intended to confer. The "dominant characteristic" of the communications industry is "the rapid pace of its unfolding," and in view of this fact the powers given to the Commission are "not niggardly but expansive . . . ." *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943). The Commission was established "to maintain . . . a grip on the dynamic aspects of radio transmission," and in "recognition of the rapidly fluctuat-



ing factors characteristic of the evolution of broadcasting" there is a "corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

In light of this basic philosophy of the Communications Act, as enunciated by the Supreme Court, it is not possible to read the broad language of Section 4(i) out of the statute, as petitioners seek to do. The Commission may "perform any and all acts," it may "make such rules and regulations, and issue such orders"—so long as not inconsistent with the Act—"as may be necessary in the execution of its functions." This is an unusual grant of administrative authority, which few other agencies have. One wonders how Congress could more clearly have authorized its agent in the communications field to do the things it had to do to get the job done, irrespective of the enumeration elsewhere in the act of other powers Congress wanted the Commission to have and exercise. The power to direct a person within the Commission's jurisdiction not to take specified action which would, in view of the Commission's findings, be contrary to the public interest and could frustrate the results of a lengthy hearing is necessary to the execution of the Commission's functions.

**C. Cases Involving the Powers of Other Administrative Agencies Show That Section 4(i) Grants the Commission the Authority To Issue the Order Under Review.**

Two cases upholding the authority of the Federal Power Commission to issue interim orders under almost identical statutory authorization are very much in point. *Amerada Petroleum Corp. v. FPC*, 293 F.2d 572 (10th Cir. 1961), *cert. denied*, 368 U.S. 976 (1962);

*Public Serv. Comm'n v. FPC*, 327 F.2d 893 (D.C. Cir. 1964).

In *Amerada* the FPC had refused to permit a gas producer to file a new rate schedule while a previously filed schedule was still under investigation. No provision of the Natural Gas Act authorized the Commission's action. The court of appeals upheld the action, largely because

"by section 16 of the Act, the Commission is expressly vested with power 'to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders \* \* \* as it may find necessary or appropriate to carry out the provisions of this Act.' Manifestly, that is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission . . . . Considering the statute and the regulations together, we entertain no doubt that the Commission was clothed with authority to enter the order . . . ." 293 F.2d at 575.<sup>9</sup>

In *Public Service Comm'n* the FPC issued temporary certificates of convenience and necessity pursuant to a regulation which was claimed to be invalid. The court of appeals upheld the regulation:

"... the problems placed under Commission administration, with consequent Commission respon-

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<sup>9</sup> The decision in *Willmut Gas & Oil Co. v. FPC*, 294 F.2d 245 (D.C. Cir. 1961), *cert. denied*, 368 U.S. 975 (1962), is not in conflict with *Amerada*. In *Willmut* the court upheld the FPC's refusal to reject a new rate schedule under different circumstances. Neither opinion cited the other, the cases having been decided only four days apart, and despite a claimed conflict between the circuits the Supreme Court denied certiorari in the two cases on the same day. Moreover, the District of Columbia Circuit in a later case upheld the FPC's exercise of power under Section 16 in a different context. *Public Serv. Comm'n v. FPC*, 327 F.2d 893 (D.C. Cir. 1964), discussed in the text, *infra*.

sibilities, call upon the courts to give the Act a scope reasonably necessary to permit the agency to perform its tasks consistently with the provisions and purposes of the legislation. The broad grant of implementing authority conferred by Section 16 is not confined to procedural regulations and we think easily encompasses Regulation § 157.28(c) . . . .

"All authority of the Commission need not be found in explicit language. Section 16 demonstrates a realization by Congress that the Commission would be confronted with unforeseen problems of administration in regulating this huge industry and should have a basis for coping with such confrontation. While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail. See *American Trucking Ass'ns v. United States*, 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337 (1953); *National Broadcasting Co. v. United States*, 319 U.S. 190, 217-221, 63 S. Ct. 997, 87 L. Ed. 1344 (1943)." 327 F.2d at 896-97.<sup>10</sup>

Section 16 of the Natural Gas Act, 15 U.S.C. § 717o, bears a striking resemblance to Section 4(i) of the

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<sup>10</sup> The fact that in the *Public Serv. Comm'n* case the Commission used its Section 16 authority to grant rather than deny or limit a right to engage in activity subject to regulation does not diminish the value of the decision as a precedent here. A grant that is not authorized by the agency's enabling statute is just as illegal as an unauthorized denial or limitation. Moreover, neither the grant of a temporary certificate to sell natural gas nor the placing of a temporary limitation upon further expansion by a CATV system can be viewed as a matter of adjusting conflicting private rights. The Public Service Commission in the natural gas case had standing because it claimed it was aggrieved as a customer of the gas producers' purchaser; Midwest Television has standing here because it is aggrieved by CATV's fragmentation of its audience. In both cases, however, the public interest is the touchstone of the Commission's authority.

Communications Act, not only in its language but also in its placement in the statute. Other subsections of Section 4 deal with a variety of housekeeping functions of the FCC, and petitioners argue that the broad language of Section 4(i) should be read to authorize the performance only of other housekeeping functions not elsewhere specified. But Section 16 of the Natural Gas Act also deals with a number of housekeeping functions. Yet it is obvious from the cases discussed above that section 16's grant of authority is not limited to housekeeping functions and in fact "is not confined to procedural regulations," 327 F.2d at 896, but instead extends to the most basic substantive responsibilities of the FPC, rate making and issuance of certificates of public convenience and necessity.

The SEC also has the power, despite the lack of explicit statutory language dealing with the question, to issue interim orders both against issues of securities and against registered broker-dealers. Under Section 3(b) of the Securities Act of 1933, 15 U.S.C. § 77c(b), the Commission by regulations exempts from the act's full registration requirements smaller public offering of securities. Acting under these regulations the Commission temporarily suspended the exemption of an issue of stock and ordered a hearing to determine whether the suspension should be made permanent. This temporary suspension automatically disqualified the broker-dealer who had underwritten the stock from engaging in the distribution of *any* securities under the exemption regulations pending completion of the hearing. The court of appeals upheld the automatic suspension against the broker-dealer's claim that it deprived him of a substantial going business without notice or hearing. *R. A. Holman & Co. v. SEC*, 299

F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962). The court noted that the broker-dealer was making two assumptions:

"The first assumption is that a hearing is required prior to the taking of agency action of the present sort. The second is that the mere bringing of charges cannot lawfully result in any serious consequence to the person charged."

The court then said:

"Neither of these closely-related assumptions is tenable in the present context. In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." 299 F.2d at 131.

"Cases of this sort," said the court, "involve a balancing of competing interests." On the one hand the securities-purchasing public must be protected; on the other is the interest of the broker-dealer in continuing to underwrite issues of securities under the simplified procedures of the exemption regulations. Authority to strike this balance against the broker-dealer, even without giving him notice or any kind of hearing, is within the "broad rule-making powers" Congress has given the SEC. *Cf. Gilbertville Trucking Co. v. United States*, 371 U.S. 115 (1962); *FTC v. Mandel Bros.*, 359 U.S. 385 (1959).

Here the public interest to be served by the FCC's interim order is not protection against fraud in the sale of securities. But neither is the effect of the order to require petitioners to discontinue an important segment of their present business activity, for



the Commission's order deals only with further expansions and not with existing service. And an important public interest is served by the order—the interest of the entire public in the fullest possible television service. Moreover, here there was notice and an opportunity, exercised in full, to submit a written presentation; neither privilege was given the broker-dealer in *Holman*.

**D. Neither of the Cases Petitioners Cite Suggests  
a Different Conclusion.**

To support their contention that the Commission lacked power to issue the interim order under review petitioners rely upon what they call “consistently established judicial precedents.” Only two cases are cited, however. Neither is apposite.

In the first case, *Standard Airlines, Inc. v. CAB*, 177 F.2d 18 (D.C. Cir. 1949), the appellant had been totally deprived of its ability to do business. That is not the effect of the interim order in this case. Moreover, the court there treated the appellant as one who had been given an “operating permit,” i.e., a franchise, by the CAB, which had then summarily suspended the franchise. Furthermore, the underlying reasoning of the decision has been rejected by the Supreme Court, and the same court of appeals has more recently so narrowly limited it as to make clear that it has no applicability here.

The issue in *Standard Airlines* was the kind of “hearing” the CAB had to hold before it could suspend a letter of registration pending proceedings looking to permanent revocation. Without the registration, which the court viewed as a franchise issued by

the CAB, the appellant could not legally operate. The Board, upon a show-cause order accompanied by a motion of an enforcement attorney, and the carrier's answer, issued the suspension order without further proceedings. The court of appeals set the order aside. It remanded the case for "a hearing of such nature and extent as will permit the carrier to present *orally* its reasons why its registration should not be suspended pending the revocation proceedings." 177 F.2d at 21. (Emphasis added.)

Whatever the validity of the *Standard Airlines* doctrine in a case where "property is being taken or destroyed," 177 F.2d at 20—the carrier there could not legally operate while its franchise from the CAB was suspended—the doctrine has no applicability where, as here, the interlocutory order does not suspend the company's operations but merely places limits on the degree of further expansion while the proceeding is in progress.

In any event, the value of the case as a precedent has been seriously weakened by later decisions.<sup>11</sup> The

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<sup>11</sup> The case also was sharply criticized by Professor Davis:

"The court seemed unaware of the fact that a typical temporary restraining order issued by a court takes or destroys property in the same sense but that no previous hearing is required. The question is not one of 'the rudiments of fair play' but is one of making the right temporary adjustment pending hearing. The Board found, rightly or wrongly, that the registration should be suspended until a hearing could be conducted on the question of revocation. The court should not have set aside that determination without inquiring into the reasons which impelled the Board to take immediate action in advance of hearing." 1 Davis, *Administrative Law* § 7.08, at 440 (1958).

court, in discussing its central holding that an oral hearing was required, referred to "two recent cases" it had decided, *L. B. Wilson, Inc. v. FCC*, 170 F.2d 793 (D.C. Cir. 1948), and *WJR v. FCC*, 174 F.2d 226 (D.C. Cir. 1948). Soon after the *Standard Airlines* decision, *WJR* was reversed by the United States Supreme Court, 337 U.S. 265 (1949). The Court held that oral argument is not a necessary element of "administrative due process." And the order involved in *WJR* disposed of the proceeding entirely, insofar as the complaining party was concerned. Clearly, oral argument may be dispensed with where the order is interlocutory, as the order under review is. Shortly, after the Supreme Court decision in *WJR*, which involved "pure" questions of law, the same court of appeals decided a case which, like *L. B. Wilson*, involved "mixed questions of fact and law." The court held that in view of *WJR* no oral hearing was required in that type of case. *American Broadcasting Co. v. FCC*, 179 F.2d 437, 442 (D.C. Cir. 1949).<sup>12</sup> Thus, *L. B. Wilson* no longer supports the *Standard Airlines* decision either.

Finally, any reliance on *Standard Airlines* must reckon with the more recent decision by the same court in the *Holman* case, discussed above. There the court squarely repudiated the notion that "a hearing is required prior to the taking of agency action" which severely limits a person's business activity and that "the mere bringing of charges cannot lawfully result in any serious consequences to the person charged."

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<sup>12</sup> Although *L. B. Wilson* was not cited in the *ABC* case, the same judge wrote the opinions of the court of appeals in all three cases—*L. B. Wilson*, *WJR*, and *ABC*.

299 F.2d at 131.<sup>13</sup> The broker-dealer in *Holman* was not put entirely out of business, while the air carrier in *Standard Airlines* could not operate while the "operating permit" it had received from the CAB was suspended by the CAB. That distinction alone could justify some difference in the procedural rights accorded, and the court in *Holman* distinguished *Standard Airlines* on just that ground. 299 F.2d at 132 n. 9. *Standard Airlines* is distinguishable from the present case on the same ground. Thus it is *Holman*, not *Standard Airlines*, that controls.

The other case petitioners rely upon is *Trans-Pacific Freight Conf. of Japan v. FMB*, 302 F.2d 875 (D.C. Cir. 1962). There are two very large and important differences between that case and this one. (1) The order issued by the Maritime Board in *Trans-Pacific* was based solely upon a finding that the complaining parties before the Board would be irreparably injured if the order was not issued. There was no finding that in any respect the public interest required issuance of the order. By contrast, the order under review rests on a sufficient public interest finding. (2) The Maritime Board has no such grant of authority as does the FCC in Section 4(i) of the Communications Act or the FPC in Section 16 of the Natural Gas Act. Moreover, the court in *Trans-Pacific* relied heavily on the Board's

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<sup>13</sup> Petitioners attempt to distinguish *Holman* on the ground that it involved a suspension of an exemption. That will not do, for an exemption was also involved in the *Standard Airlines* case. Nor can *Holman* be disposed of by asserting that Congress had "explicitly reviewed and approved" the SEC's power. All that had happened was that a House report and a Senate report noted that the SEC's regulations contained the rules which were later at issue in *Holman*. Neither approval nor disapproval was "explicitly" given by even the committees, let alone by "Congress."

history of having disclaimed authority to issue temporary relief and of having repeatedly asked Congress to give it such authority. Very recently the Supreme Court has made clear that this is not a sufficient basis for finding an absence of power to accord interim relief.<sup>14</sup>

In other words, neither *Standard Airlines* nor *Trans-Pacific* can be taken as enunciating a general principle of administrative law divorced from the specific facts and statutory language which the case involved, especially where part of the court's reasoning is no longer acceptable. The question of the Commission's power to issue the interim order here must be resolved by examining, in light of closely analogous precedents, Congress' grant of power to the Commission, under Section 4(i) of the Communications Act, to issue rules and orders. Seen in this context, and with no real claim, let alone showing, of procedural unfairness to petitioners, the Commission's order should be upheld.

## II. THE COMMISSION'S FINDINGS ADEQUATELY SHOW THAT THE INTERIM ORDER WAS REQUIRED IN THE PUBLIC INTEREST.

Apart from the question of statutory authority, petitioners argue that the interim order is not supported by valid findings. To the contrary, the findings are adequate to show that the hearing's purpose would be frustrated if no interim order were entered and hence that the order was required in the public interest.

Petitioners cite cases which indicate the criteria governing the issuance of a stay at the instance of a party who, having had his day in court and having lost, seeks postponement of the judgment while he pursues further judicial or administrative review. Assuming

<sup>14</sup> See *FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).



those were the criteria governing the Commission in considering whether to issue the interim order under review, the essential criterion—that the public interest requires issuance of the order—has been met.

In *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 927 (D.C. Cir. 1958), one of the cases petitioners cite, the court stated that “the public interest considerations . . . are crucial in this type of case.” In *Yakus v. United States*, 321 U.S. 414, 440 (1944), where the Supreme Court upheld a statute forbidding stays pending judicial review of price control regulations, the Court said:

“[W]here an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff.”

*Cf. Virginian Ry. v. System Federation*, 300 U.S. 515, 552 (1937).

Moreover, the conclusion of the administrative agency on the public interest question is entitled to great weight. “Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest.” *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 15 (1942). A court should not substitute its “judgment as to the public interest for that of the Commission.” *Associated Securities Corp. v. SEC*, 283 F.2d 773, 775 (10th Cir. 1963); see *Hamlin Testing Labs, Inc. v. AEC*, 337 F.2d 221 (6th Cir. 1964).<sup>15</sup>

<sup>15</sup> *Associated Securities* and *Hamlin* are two of the cases cited by petitioners.

The Commission's "judgment as to the public interest" appears not only in the Memorandum Opinion and Order under review but also in the *Second Report and Order*, Docket Nos. 14895, 15233, and 15971, 2 F.C.C.2d 725 (1966), which adopted the CATV rules. There the Commission summed up its conclusions regarding CATV's potential impact on UHF, particularly non-network UHF stations:

"123. There is no doubt as to the seriousness of the question posed. . . . if a CATV, with 12 or 20 channel capacity, can obtain very substantial numbers of subscribers in these same markets (by which we mean percentages of 50% or over), the UHF stations might face a very difficult hurdle. The audience for non-network stations is limited . . . and this limited audience might be greatly reduced since very substantial numbers of people interested in viewing the non-network programming would be watching the distant independents (e.g., those of New York or Los Angeles). We think this follows as a matter of common sense . . . . Finally, we point out that it is not just a matter of causing the demise of the independent UHF stations; if these stations' revenues are substantially reduced because of such CATV activity, so that they do not have the financial base to program effectively, the result is still a detriment to the public interest 'in the larger and more effective use of radio' (Communications Act, Section 303(g)). In short, the problem posed is whether, if CATV succeeds greatly—for example, to the 50 to 85% figure predicted by its optimistic proponents—there is correspondingly a grave danger to UHF broadcasting." 2 F.C.C.2d at 774-75.

"In view of these conclusions," the Commission said, "we think that our course of action is clear."

"We must thoroughly examine the question of CATV entry into the major markets, and au-

thorize such entry only upon a hearing record giving reasonable assurance that the consequences of such entry will not thwart the achievement of the Congressional goals. We cannot sit back and let CATV move signals about as it wishes, and then if the answer some years from now is that CATV can and does undermine the development of UHF, simply say 'Oh well, so sorry that we didn't look into the matter.' " <sup>16</sup> 2 F.C.C.2d at 776.

Crucial to the accomplishment of the goal of assuring that CATV operations will be consistent with the public interest was the necessity

"to examine thoroughly such operations before they become established or well entrenched. Once entrenched, it is difficult, if not wholly impracticable in the light of the disruption which would result, to take effective action or to attempt to roll back the situation, if it should develop or be shown that the CATV operation is inconsistent with the public interest." 2 F.C.C.2d at 782.

This same concern for examining the public interest questions in advance was expressed in the Commission's discussion of the extent to which "grandfathered" CATV systems should be permitted to continue adding subscribers:

"... Such systems, which may recently have gone into operation without regard to the Commission's

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<sup>16</sup> Although the Commission's distant signal rules and policies are chiefly directed to CATV systems' extending television stations' signals beyond their Grade B contours, the Commission also made clear that the same public interest questions are involved where part of one television market lies within the Grade B contours of stations in a different market, because as a practical matter the latter stations are "distant" stations in the first market. 2 F.C.C.2d at 786 n.69.

explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in an evidentiary hearing). . . . Finally, we wish to stress one important facet: We have previously put all parties on notice as to the pendency of our proposal and have now put parties on notice that there should not be expansion of major market systems from a few thousand subscribers to a very substantial number of subscribers until resolution of the public interest issues posed. We expect CATV operators to heed this notice and not to attempt to circumvent orderly consideration of any petition in this respect by an extraordinary effort to wire up the community or a substantial portion of it. In any event, we are requiring the submission of data showing the extent of construction of the system as of February 15, 1966. While we expect the ordinary wiring operations to have continued since that date, any extraordinary wiring efforts or entry into patently new geographical areas (e.g., extension of a system from a suburb into the main community) will be at the risk of the system and will not be accorded weight in the judgment to be made." 2 F.C.C.2d at 785-86.

These are the basic findings on which the Commission grounded its conclusion that interim relief *pendente lite* should be granted in a proper case. The findings the Commission made in the proceeding below amply support the application of the policy here. They show that unless a limit was placed upon further expansion by petitioners' CATV systems while the Commission

proceeding is underway<sup>17</sup> the outcome of the proceeding could well be frustrated. The Commission found:

(a) that San Diego, the 54th ranked market, is presently served by five television stations (R. 579);

(b) that there is considerable UHF activity in San Diego with a new station on the air, a construction permit outstanding for another station which plans to commence operations soon, and an application pending for still another station, which would be a non-commercial educational station (R. 587);

(c) that assignment of another UHF channel to San Diego is under consideration by the Commission (R. 579);

(d) that by carrying Los Angeles signals from 100 miles away CATV systems in the San Diego area, including petitioners', put those signals on an equal technical level with San Diego signals in the homes of subscribers (whether or not any or all of San Diego is within the Los Angeles stations' Grade B contours) (R. 589);

(e) that several of petitioners' CATV systems began operating two to four months prior to the commencement of the proceeding (R. 587);

(f) that although petitioners' CATV systems and the other CATV systems operating in the San Diego area then had relatively few subscribers

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<sup>17</sup> Petitioners claim that the proceeding will take a long time. It may be noted by the Court that on October 25, 1966, Southwestern, with the concurrence of the other petitioners but not of intervenors, moved for a further delay in the hearings, now scheduled to begin December 6, 1966.



(approximately 17,000 on February 15, 1966, or about 4.6 per cent of the homes in San Diego County within KFMB-TV's Grade A contour), there was considerable potential for expansion (R. 588);

(g) that there are approximately 380,000 housing units in San Diego County and the CATV franchises outstanding cover communities having approximately 90 per cent of all homes in the county within the station's Grade A contour (R. 587-88);

(h) that there are approximately 294,000 homes, or 78 per cent of all homes in the county within the station's Grade A contour, in communities where CATV systems, including petitioners', are already operating and carrying Los Angeles signals (R. 588);

(i) that approximately 70 per cent of the populated area in unincorporated communities adjacent to metropolitan San Diego has been wired, with 30 per cent of the homes in this area already having become subscribers (*Ibid.*); and

(j) that unless this expansion is appropriately limited while the proceeding is underway thousands of new subscribers could be wired up within a very short period of time (R. 588).

The Commission also said that it "had made clear in the Second Report and Order the impracticability of withdrawing service, once established, because of its disruptive effect," and that it had "also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of

CATV substantially throughout an area such as San Diego is permitted.” (R. 588).

In view of the foregoing, and in view of the “number of unresolved issues present,” the Commission set the matter down for evidentiary hearing. (R. 588) It said the case presented “a classic case for a hearing” on the public interest questions involved in CATV carrying Los Angeles signals in the San Diego area. (R. 587) Finally, the Commission concluded, an interim order “appropriately limiting further expansion until resolution of the public interest issues is called for.” (R. 588).

Intervenors respectfully submit that the Court cannot conclude that the Commission’s judgment as to the public interest questions, which is, as we have noted, entitled to great weight, is erroneous. It may be true, as petitioners assert (Mission Brief, p. 15), that the Commission “does not *know* . . . whether irreparable injury would result to the public interest if a stay were not issued.” (Emphasis added.) But the Commission should not be held to a standard of certainty. It is enough that its judgment is not shown to be arbitrary or capricious. That has not been shown and it cannot be shown.

Petitioners also claim that the interim order is invalid because the Commission did not find that without it intervenor Midwest would suffer irreparable injury.<sup>18</sup> The argument is misplaced. The petitioners in *Hamlin*, *Associated Securities*, and the other cases cited in Mission’s brief were seeking to suspend the effective

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<sup>18</sup> Petitioners also claim that the Commission did not find that a stay would not cause irreparable injury to them. Suffice it to say that petitioners did not, and still do not, show that they will suffer such injury if the interim order is affirmed.

date of an order which adversely affected their interests while they litigated further the legality of the order. It would stand to reason that a petitioner in such circumstances would have to show, *inter alia*, that he would suffer irreparable injury if the order become effective immediately, though subject to reversal later on. That is not the case here. The Commission granted the temporary relief that had been sought because it found that the public interest would suffer otherwise. It was not required to withhold temporary relief, in the face of such a finding, on the ground that a failure to grant the relief would not cause a petitioning party irreparable injury. Such a proposition, which defies common sense, is not supported by any case petitioners do or could cite.

### **III. PETITIONERS' CATV SYSTEMS ARE ENGAGED IN INTER-STATE COMMUNICATION BY WIRE OR RADIO AND ARE SUBJECT TO THE COMMUNICATIONS ACT AND TO FCC REGULATORY AUTHORITY.**

#### **A. CATV Constitutes "Interstate Communication by Wire or Radio" to Which the Act Applies.**

Section 2(a) of the Communications Act, 47 U.S.C. § 152(a), provides that the Act shall apply "to all interstate and foreign communication by wire or radio" and to all persons engaged in such communication. Sections 3(a) and (b), 47 U.S.C. § 153(a), (b), define wire and radio communication as the transmission of writing, signs, signals, pictures and sounds by means of wire and or radio, including "all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."

CATV receives, forwards and delivers communications and is incidental to wire and radio transmission. See *Clarksburg Publishing Co. v. FCC*, 225 F.2d 511,

517 (D.C. Cir. 1955). Moreover, CATV systems are part of the stream of continuous interstate communications by radio and television. They are thus within FCC jurisdiction even though located within a single state. See *Pacific Telatronics, Inc.*, 4 R.R.2d 145, 149 (1964); *Ward v. Northern Ohio Telephone Co.*, 300 F.2d 816 (6th Cir.), *cert. denied*, 371 U.S. 820 (1962); see also *United States v. American Tel. & Tel. Co.*, 57 F.Supp. 451, 454 (S.D.N.Y. 1944), *aff'd per curiam sub nom. Hotel Astor v. United States*, 325 U.S. 837 (1945); *Idaho Microwave, Inc. v. FCC*, 352 F.2d 729 (D.C. Cir. 1965).

Under the circumstances it is not surprising that petitioners do not quarrel with the basic proposition that their CATV systems are engaged in interstate communication. Indeed, the National Community Television Association (NCTA), the trade association of the CATV operators and manufacturers, has not only conceded but argued that CATV is in interstate commerce.<sup>19</sup>

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<sup>19</sup> "A community antenna television system is *directly concerned with television broadcasting, an area of governmental control of which there has been complete occupation by the Federal Government . . .*" Brief of NCTA Before Conn. Public Utilities Commission, Docket No. 10250, p. 3 (1964). (Emphasis supplied.)

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"Briefs are being filed with the Nevada PSC, calling the attention of that Commission to the fact that CATV systems are *unquestionably engaged in interstate commerce . . .*" *Id.*, p. 9. (Emphasis supplied.)

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"That community antennas are in interstate commerce for the purpose of inclusion in the broad field of radio and television may reasonably be argued . . . [T]he Federal Communications Commission has actually exercised jurisdiction to promulgate rules and regulations affecting community antenna systems." *Id.* Ex. B, p. 20.

## **B. The Commission Has Power to Regulate CATV Systems.**

Section 1 of the Communications Act, 47 U.S.C. § 151, directs the FCC to "make available to *all* of the people of the United States a rapid, efficient, Nationwide wire and radio communication service." There are two especially relevant statutory corollaries of this mandate. Section 307(b) of the Act, 47 U.S.C. § 307(b), requires that "the Commission shall make such distribution of licenses, frequencies, hours of operation and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." Section 303(h), 47 U.S.C. § 303(h), authorizes the FCC "to establish areas or zones to be served by any station." In accordance with these provisions, the FCC in 1952 established limitations on the power and height, and hence the service areas, of television stations. At the same time, it adopted a table of television assignments allocating specific channels to specific communities to provide television service oriented to meet the individual needs and interests of the community and area served. This nationwide plan of local and area television broadcast service was upheld by the courts, *Logansport Broadcasting Corp. v. United States*, 210 F.2d 24 (D.C. Cir. 1954); *Peoples Broadcasting Co. v. United States*, 209 F.2d 286 (D.C. Cir. 1953), and approved by the Congress in passing the all-channel receiver legislation (P.L. 87-529) in 1962. See H.R. Rep. No. 1559, 87th Cong., 2d Sess. 3 (1962); Senate Rep. No. 1526, 87th Cong., 2d Sess. 7 (1962).

Section 303(r) of the Communications Act, 47 U.S.C. § 303(r), authorizes the FCC to "make such rules and regulations and prescribe such restrictions and conditions not inconsistent with law as may be necessary



to carry out the provisions of this Act.” See also Section 4(i). Accordingly, the FCC has the power to direct rules at CATV systems, which are instrumentalities of interstate communications by wire and radio, to ensure that CATV communications operations are consistent with and not harmful to this overall plan of local and area television service established in the public interest.

The FCC’s power to regulate CATV operations indirectly by means of conditions in the licenses of microwave facilities which serve CATV was affirmed in *Carter Mountain Transmission Corp. v. FCC*, 321 F.2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963). Not only the Communications Act but also various court decisions persuasively demonstrate that the FCC’s authority to regulate is not confined to such indirect means but includes the power to regulate CATV systems directly.

In *National Broadcasting Co. v. United States*, 319 U.S. 190, 219 (1943), the Supreme Court stated that “in the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers.” See also *American Trucking Ass’n v. United States*, 344 U.S. 298 (1953), which affirmed the power of the ICC, acting under a similar legislative mandate, to regulate practices which would disrupt its scheme of regulation if allowed to continue unregulated. Addressing itself specifically to the question of FCC regulatory authority over CATV before the Commission had asserted that authority, the Court of Appeals for the District of Columbia Circuit intimated that the authority exists. *Clarksburg Publishing Co. v. FCC*, *supra*, 225 F.2d at 517. See also *Philadelphia Television Broadcasting Co. v.*

*FCC*, 359 F.2d 282, 284 and n.5 (D.C. Cir. 1966); *Citizens TV Protest Committee v. FCC*, 348 F.2d 56, 62-63 (D.C. Cir. 1965).

The contention that if the FCC can regulate CATV it could, by the same token, regulate or control virtually any activity, such as movie theatres, newspapers or other activities which may be competitive with or ancillary to wire and radio communications, is simply hyperbole. FCC authority to regulate CATV is not based on any theory of "plenary power" to regulate all activities which have some connection with or relation to some aspect of interstate wire and radio communication. CATV systems are instrumentalities of interstate communications by wire and radio to which the Act applies, and CATV has a uniquely close relationship to a regulatory scheme established pursuant to specific authority under the Act. In the case of CATV, not only specific provisions of the Act but persuasive judicial precedent support FCC power to regulate CATV.

**C. The Commission's Authority Is Not Confined to Regulation of Common Carriers and Licensing of Radio Stations.**

Petitioners assert, however, that the Commission may not regulate a CATV system because it is not a common carrier by wire or radio under Title II of the Act and is not a radio station under Title III.<sup>20</sup>

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<sup>20</sup> Petitioners also argue that the Commission's assertion of direct jurisdiction over CATV is precluded by a prior Commission view that it did not have such jurisdiction and by past Commission attempts to obtain express legislative authority to regulate CATV even after issuing the *Second Report and Order*. We do not agree that in 1959 the Commission held that it had no jurisdiction over CATV. In *CATV Systems and Auxiliary Television Services*, 18 R.R. 1573 (1959), the Commission held that CATV systems could not be regulated as communications common carriers or as

Even if petitioners' premise were correct the conclusion would not follow. Title III of the Communications Act contains "provisions relating to radio," which includes television, not "provisions applicable only to broadcasters." The CATV rules very much *relate* to television. One purpose of the rules, for example, is to "generally encourage the larger and more effective use of radio [and television] in the public interest," Section 303(g), and the Act does not say this must be accomplished only by applying rules to broadcasters.

Moreover, the premise of the argument is unsound. Petitioners correctly assert that the Commission's "two principal" functions are the regulation of common carriers by wire and radio and the licensing and regulation of radio stations, and that the "primary purpose" of the Act is the same. But neither "principal" nor "primary" means "sole," and there is nothing in the Act to indicate that common carrier regulation and radio station licensing and regulation are the sole functions of the Commission. Nor can support for such a

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television broadcast stations. The Commission also held that it could not regulate CATV systems through the licensing of microwave facilities, a position which it later changed and which change was approved in the *Carter Mountain* case, *supra*. The Commission further found that it did not have "plenary power" to regulate CATV, but the Commission either did not consider, or expressly declined to rule with respect to, the legal grounds on which it ultimately based its direct regulation of CATV. 18 R.R. at 1595.

As to the Commission's efforts to obtain express legislative authority, it is necessary only to refer to *Wong Yang Sung v. McGrath*, 339 U.S. 33, 47 (1950), as recently reaffirmed in *FTC v. Dean Foods Co.*, *supra*; a court should not infer "that an agency admits that it is acting upon a wrong construction by seeking ratification from Congress" because "public policy requires that agencies feel free to ask legislation which will terminate or avoid adverse contentions and litigations."

view be drawn from the fact that the 1934 Act merged the common carrier functions of the ICC and the radio licensing functions of the Federal Radio Commission into one unified act under a single agency. If anything, the merger freed the new Commission of the need to fit its regulatory actions into a particular subcategory of communications. The 1934 Act is "a comprehensive scheme for the regulation of interstate communication," *Benanti v. United States*, 355 U.S. 96, 104 (1957), and the Communications Commission was created "to regulate all forms of communication," H.R. Rep. No. 1850, 73d Cong., 2d Sess. 3 (1934), quoted in *Benanti*, 355 U.S. at 104 n. 14.

Petitioners' argument has been effectively disposed of in a closely analogous situation. In *Carter Mountain Transmission Corp. v. FCC*, *supra*, the Commission denied an application for common carrier microwave facilities to relay distant television signals to three CATV systems because of the likely impact on local television broadcast service. The court rejected the argument that the Commission should not have applied principles of radio broadcast law to an application for common carrier facilities.

\* Here the Federal Communications Commission is charged with the duty of regulating not only common carriers by radio but broadcasters of television programs. It cannot let its decisions in the radio carrier field interfere with its responsibilities in the television broadcasting field. In both fields, it must 'make available, so far as possible, to all the people of the United States,' adequate and efficient service. See Section 1 of the Communications Act of 1934, as amended, 47 U.S.C. § 151 (1958). . . . The interest of the listen-

ing and viewing public in better and more effective service is paramount.” 321 F.2d at 362.<sup>21</sup>

Little doubt should remain, after *Carter Mountain*, that the Commission may regulate CATV as an integral part of television broadcasting. CATV is interstate communication by wire and—like a common carrier—is within the literal terms of Sections 1 and 2(a) of the Communications Act. The Commission “cannot let its decisions in the [CATV] field interfere with its responsibilities in the television broadcasting field.” 321 F.2d at 362. Whether it is CATV or a common carrier that is being regulated, “the interest of the listening and viewing public in better and more effective service is paramount.” *Ibid.* The Commission has sought to integrate CATV into the national television

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<sup>21</sup> *Carter Mountain* also disposes of petitioners’ argument, predicated upon *Regents of the University System v. Carroll*, 338 U.S. 586 (1950), that such provisions as Section 307(b) as well as Sections 303(g), (h), (r), (s)—are relevant only in the Commission’s exercise of its “title III jurisdiction” to license radio stations. The applicant in *Carter Mountain* had sought a certificate of public convenience and necessity, pursuant to Section 214(a) of the Act, which is in Title II, but the court held that Section 307(b) and other “title III” principles provisions were controlling.

The *Regents* case had nothing to do with this question. There the Commission had renewed a broadcast license on condition that the licensee repudiate a stock purchase contract with a third party. The licensee did so. There appears to have been no express provision in the contract making it subject to the approval of the Commission. The Supreme Court merely held that the third party could recover for breach of the contract from the licensee. This is all the case stands for and nothing more. Petitioners can draw no solace from the Court’s language to the effect that the Commission could make a choice only within the scope of its licensing power. The Court’s observation related to the issue which was before the Commission, *i.e.*, whether the Commission had the power to affect the rights of a third party, who was not subject to the Communications Act, vis-a-vis a licensee.



structure and to ensure that CATV supplements rather than supplants that structure. In this fashion the Commission is attempting to meet its statutory obligation to "generally encourage the larger and more effective use of radio in the public interest," Sec. 303(g), just as it was attempting to meet that obligation in 1952 when it first established a Table of Allocations governing the national television structure.

**D. The Commission's CATV Regulations Are Properly Designed to Minimize Disruption of the National Television Structure Which Congress Has Approved.**

Television broadcasting was a young industry in the late 1940's, when the Commission undertook to chart the industry's future. AM radio had developed helter-skelter, with license grants made essentially on an *ad hoc* "demand" basis with little effort to relate any particular application, except insofar as electrical interference was concerned, to the number and location of radio stations that were in existence at the time of the application or that could come into existence later. The Commission took hold of television at an early stage and developed a comprehensive plan under which available channels were to be allocated to different communities and areas. The allocation was designed to satisfy, "so far as possible," two different public interest goals—(1) at least one, and preferably more than one, off the-air service for "all the people of the United States," and (2) local or area television stations for as many communities as possible. Maximum fulfillment of the first goal alone would suggest having a substantial number of superpowerful stations in a handful of strategically located cities, and the so-called DuMont plan called for essentially such a channel allocation plan. This approach, however, was

thought by the Commission to represent too great a sacrifice of the second goal (because of electrical interference problems). Local and area stations could tailor their programming—for instance, news and discussion of local or regional affairs—to the needs and interests of the people in the communities the stations served, thus giving those people both national and locally oriented programming instead of only the former. The DuMont plan was therefore rejected. Channel allocations were made with an eye toward a balance between the two goals described above. As a necessary corollary, specified limits were placed upon tower heights and transmitter power, thus “establish[ing] areas or zones to be served by any stations,” Sec. 303(h).<sup>22</sup> The Table of Allocations adopted in 1952 is basically the same type of Table in use today, although a great many small changes have been made over the years, as experience was acquired.<sup>23</sup> The Commission’s approach was sustained in court against precisely the same kind of arguments as are made in the Mission brief, pp. 40-42. *Logansport Broadcasting Corp. v. United States*, *supra*; *Peoples Broadcasting Co. v. United States*, *supra*.

The original Table contemplated use of both UHF and VHF channels. By 1962, there were 500 VHF stations on the air (of a total of 681 channels allocated) but only 103 UHF (out of 1,544 channels allocated). Thus, 93 per cent of the available UHF chan-

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<sup>22</sup> See Sixth Report on Television Allocations, 1 R.R., Part 3, 91:599 (1952); 47 C.F.R. § 73.606(b).

<sup>23</sup> The latest version of the Table, adopted in the Fifth Report in Docket No. 14229, released Feb. 11, 1966, provides for one or more television channel assignments to each of 792 different cities in the continental United States. 2 F.C.C.2d 527, 551 (1966).

nels were idle. With little public demand for "all-channel" sets, only 16 per cent of television receivers in American homes in 1962 could receive UHF, and only 6 per cent of sets produced in 1961 could do so. H.R. Rep. No. 1559, 87th Cong., 2d Sess. 2 (1962). The House Commerce Committee said:

"If the American people are to have the chance to enjoy the benefits of television service to the fullest degree, then a major portion of the UHF channels not now assigned must be put into operation." (*Ibid.*)

Congress thereupon took the extraordinary step of enacting the "all-channel" receiver law, which enabled the Commission to require all television sets shipped in interstate commerce (or imported from abroad) to be capable of receiving all of the UHF and VHF television broadcast frequencies. Act of July 10, 1962, 76 Stat. 150, adding Secs. 303(s) and 330 to the Communications Act. The Commission has implemented the statute by appropriate regulations. 47 C.F.R. § 15.65(a).

The all-channel receiver law represents clear congressional approval of the policy decisions that underlay the adoption of the Table of Allocations. The House Committee Report declared "the goal" to be

"a commercial television system which will (1) be truly competitive on a national scale by making provision for at least four commercial stations in all large centers of population; (2) provide at least three competitive facilities in all medium-sized communities; and (3) permit all communities of appreciable size to have at least one television station as an outlet for local self-expression." (*Id.* at 3.)

The committee might as well have said that San Diego was not to be a part of the Los Angeles television market but was instead to have as many San Diego television stations—at least four commercial stations—as the available audience could support. The Commission has voiced the fear that its goals and the goals set forth in the committee's report will be frustrated if CATV systems are permitted to transport television signals from a few huge metropolitan areas like Los Angeles, New York, and Chicago into other cities and communities throughout the United States.

Underlying the Commission's concern is a basic proposition of broadcasting economics, *viz.*, that a station's revenues—and hence its ability to survive and to offer quality programming—is a direct function of its audience. If all the people of San Diego, for example, could view all the San Diego and Los Angeles stations, present and potential San Diego stations would suffer a sharp reduction in their audiences. If these San Diego stations were driven off the air, to take the extreme case, San Diego would not even have "at least one television station as an outlet for local self-expression," the bare minimum contemplated in the House Report for "all communities of appreciable size." If the VHF stations survived but the existing and future UHF stations did not, San Diego would have only three English-language stations, one of them broadcasting from Mexico, and the higher prices San Diegans pay for television sets because of the all-channel receiver law would be wasted. Even if all the local and area stations could continue to operate, the audience fragmentation would almost certainly impair the quality of their programming and hinder future efforts to improve service or programming.

**E. Petitioners' CATV Systems Are Not Mere  
"Master Antennas."**

Petitioners argue that if the Commission needed express legislative authorization before it could require that television sets be capable of receiving all channels, express legislative authorization is needed before CATV can be regulated to prevent frustration of the national television goals. Moreover, say petitioners, if the Commission now has statutory authority to issue the CATV rules it *ipso facto* has authority (a) to bar the erection by individual viewers of "tall receiving antennae," (b) to prevent the sale in San Diego of television sets "capable of receiving Los Angeles television station signals," and (c) even to issue rules "requiring television viewers to tune their sets only to their home community stations." The premise of this series of assertions seems to be that petitioners' CATV systems are merely an extension of the home receiver whose only purpose is to improve television reception.

This "master antenna" argument has been effectively laid to rest not only by the Commission, 2 F.C.C. 2d at 780, but also by a district court. In *United Artists Television, Inc. v. Fortnightly Corp.*, 255 F. Supp. 177, 195 (S.D.N.Y. 1966), a case involving copyright liability of CATV systems, the court said flatly:

"Defendant's [CATV] systems are not passive antennas. They consist of sophisticated, complex, extremely sensitive, highly expensive equipment, especially constructed and designed to reproduce the electromagnetic waves received from the originating television station and to propagate and transmit the new electromagnetic waves through an elaborate network of coaxial cables. The term 'passive' signifies a device which does not add energy to any of the signals being handled by the



system. In that sense, only the antenna and the cable are passive. All of the other equipment, such as the preamplifiers, 'Teletrol' demodulators and modulators, WCON converters, 'Channel Commanders' and line and distribution amplifiers, used by defendant's systems at various times, are active, not passive.

"The intensity of the electromagnetic waves as received at defendant's antenna is insufficient to enable them to travel along the coaxial cable to the subscribers and to produce an acceptable or viewable picture without the reproduction of the signals received on new locally supplied energy at higher intensity by defendant's elaborate electronic equipment."<sup>24</sup>

Unlike CATV systems, people watching television in their living rooms are not engaged in communication by wire, nor are they so engaged if they build tall antennas on their houses, nor are television set manufacturers so engaged, and the Commission neither possesses nor claims the power to regulate either viewers or manufacturers.

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<sup>24</sup> The court went on:

"The dominant, over-all function and design of defendant's systems at all times—regardless of the individual instruments or specific equipment used from time to time—were and are aimed at the objective of propagating electromagnetic energy for the purpose of transmitting TV program material to a large number of subscribers, who are, in effect, their audience. In view of the foregoing characteristics, defendant's systems are, in material respects, analogous to television stations, translator and repeater stations.

"Defendant's systems are communication systems for the reasons that they were designed and engineered to, and do, convey information from one location to other locations."  
255 F. Supp. at 196.

### F. The Eighth Circuit Proceeding.

Finally, we note that the *Second Report and Order* is before the Court of Appeals for the Eighth Circuit for review.<sup>25</sup> One of the contentions made there is that the Commission lacks the power to regulate CATV systems that do not receive signals through microwave radio relay. The certified index to the record of the Commission proceedings leading up to the *Second Report and Order* is also in the Eighth Circuit. That record contains 1,593 separate items totalling 5,322 pages; the index alone is 105 pages long. Thus, to the extent that consideration of the record is necessary to review the Commission's findings, on impact and the like, in support of its power to adopt the CATV rules, that task cannot easily be performed by this Court. Moreover, under the review statute under which the Eighth Circuit proceedings were brought, that court has "exclusive jurisdiction" to review the validity of the *Second Report and Order* upon direct appeal from that action. 5 U.S.C. § 1039. For these reasons the Court might consider that it need do no more than satisfy itself that the Commission has not "patently traveled outside the orbit of its authority" by determining whether the alleged lack of jurisdiction "is apparent on the face of the order," *cf. FPC v. Arizona Edison Co.*, 194 F.2d 679, 685-86 (9th Cir. 1952). In this connection, intervenors respectfully point out that before the *Second Report and Order* was adopted another court of appeals had suggested that the Commission was probably empowered—if not required—to regulate CATV because of its apparent impact upon television broadcasting. *Citizens TV Pro-*

<sup>25</sup> *Midwest Video Corp., et al. v. United States, et al.*, Nos. 18,052, 18,481, 18,482, 18,348.

*test Committee v. FCC*, *supra*, 348 F.2d at 62-63. More recently the same court held that the Commission is permitted to choose to regulate CATV systems "as adjuncts of the nation's broadcasting system" rather than as common carriers, noting that the Commission's assertion of jurisdiction in the *Second Report and Order* "is substantial enough" to justify its refusal to assert common carrier jurisdiction over CATV. *Philadelphia Television Broadcasting Co. v. FCC*, *supra*, 359 F. 2d at 284 and n. 5.

#### IV. NEITHER THE ORDER UNDER REVIEW NOR THE CATV RULES VIOLATE THE FIRST AMENDMENT.

Petitioners argue that the CATV rules and the order under review are unlawful because they impose a "prior restraint" on petitioners' "right" to carry the television signals they choose to carry, in violation of the First Amendment.<sup>26</sup>

We need not stop here to debate the abstract question whether CATV systems are "entitled to the protection of the First Amendment." Presumably everyone is so entitled, but petitioners, like newspaper publishers, "are engaged in business for profit exactly as are other businessmen who sell food, steel, aluminum, or anything else people want," *Associated Press v. United States*, 326 U.S. 1, 7 (1945), and in conducting that business they are subject to reasonable and proper laws and regulations. Nor is it of use to debate the concept of "prior restraint"; we will assume for the sake of

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<sup>26</sup> Although the argument is addressed to the rules generally, only the distant signal rules and policies and their application are involved on this appeal. The order under review does not require petitioners to carry any particular television station or to afford any station non-duplication treatment.

argument that whatever "restraint" has been imposed is a "prior" restraint.

The Commission has concluded that people in cities like San Diego will in the long run be better off with a wider choice of off-the-air television services. It has concluded (tentatively, at this preliminary stage) that unchecked expansion of CATV carrying Los Angeles signals could prejudice that goal—and unfairly, at that. Petitioners merchandise in San Diego the Los Angeles signals they pluck from the air without the permission of or payment to the originators of those signals; they bring to San Diego many programs that have been purchased by San Diego area stations for exclusive broadcast in San Diego. The real issue here is whether the Commission, having reached the conclusions it reached, has abridged free speech—in the constitutional sense—by limiting CATV activities which, to quote this Court, "could be described as \* \* \* inconsistent with a finer sense of propriety \* \* \* . . . ." *Cable Vision, Inc. v. KUTV, Inc.*, 335 F.2d 348, 352 (9th Cir. 1964).

In considering this question, it must be assumed that the Commission has jurisdiction to regulate CATV and that it has properly asserted that jurisdiction in keeping with its statutory mandate to "encourage the larger and more effective use of radio in the public interest" (Communications Act, § 303(g)), "to establish areas or zones" served by television stations (§ 303(h)), to "provide a fair, efficient, and equitable distribution of radio service" to each of the several states and communities (§ 307(b)), as well as to encourage the development and expansion of a nationwide system of television service provided by local and area television stations—the express congressional

policy underlying the enactment of the all-channel receiver legislation.

As we have shown above, the Table of Allocations, with its associated limits on power and tower height of television stations, has long governed the location and service areas of television stations. The multiple ownership rules and duopoly and concentration rules have long controlled the number and location of television stations which an entity may own or control and the extent to which the signals of its stations may be extended. The rules and policies with respect to the operation of so-called satellite stations and translator stations also limit the extension of the signals and hence of the programs of particular stations. None of these Commission rules or policies is subject to First Amendment challenge on the ground that it limits the range of the signals of television stations. *Cf. National Broadcasting Co. v. United States, supra*, 319 U.S. at 226-227. No such rule or order has ever been struck down on First Amendment grounds. Certainly it is clear that a CATV system has no greater rights under the Constitution to extend the signal of a broadcast station than the station itself has. When the Commission determines that a CATV system may not transmit the signals of a television station it is not regulating program content. It is merely determining where and under what circumstances the signals of those stations may be carried. This is precisely what the Commission does with television stations. The FCC is not required in the name of free speech to allow the stations in Los Angeles to operate satellite television stations and translators in San Diego and throughout the United States for the purpose of having their signals transmitted nationwide.



Petitioners argue that Commission regulation of communications is justified only by the "scarcity of radio frequencies," and that, since petitioners' CATV systems do not use "radio frequencies," they cannot constitutionally be regulated. The premise of the argument is not sound. If "scarcity of radio frequencies" were the only excuse for regulation of communications, a great deal of long standing—and obviously valid—regulation would be unconstitutional. For example, by virtue of Section 214 of the Act the Commission possesses—and exercises—the power to limit or prohibit the expansion of telephone and telegraph communication services into new geographic areas. Similarly, under Section 605 no one who has received any interstate or foreign communication by wire or radio—other than radio broadcasts—may retransmit such communication other than through authorized communications channels, and no one may intercept any such communication and divulge its contents without being authorized by the sender. See *Benanti v. United States*, 355 U.S. 96 (1957); *United States v. Fuller*, 202 F. Supp. 356 (N.D. Cal. 1962). In neither of these situations can there be any argument that Congress is without power to regulate merely because "speech" is involved, and yet these statutory provisions are not based upon "scarcity of radio frequencies."<sup>27</sup> Moreover, the principal case petitioners

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<sup>27</sup> Federal powers to regulate interstate "transmission of intelligence" can be traced back at least 100 years, long before there was radio and a "scarcity of radio frequencies," and those powers "are not confined to the instrumentalities of commerce . . . known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U.S. (6 Otto.) 1, 9 (1877).

rely on, *National Broadcasting Co. v. United States*, *supra*, squarely rejects the underlying assumption of petitioners' argument. The Court said that it could not "regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other." 319 U.S. at 215.

Petitioners' reliance on the state court decision in *Weaver v. Jordan*, 411 P.2d 289 (Calif. 1966), *cert. denied*, 385 U.S. — (1966), is entirely misplaced. There is not here, as there was there, "a complete ban of expression and communication through a specified medium," 411 P.2d at 295. The state statute the court struck down there totally prohibited subscription television in California, whether by closed circuit cable or through the air. Here, by contrast, are rules, policies and an order expressly grounded in public interest findings by the Federal agency which is given the primary responsibility for regulation of the communications industry in the public interest. The *Weaver* decision itself noted that "the practices or business of the various media of expression or of those disseminating their beliefs or ideas may be regulated or taxed in a reasonable or nondiscriminatory manner," 411 P.2d at 297, and it distinguished the "sweeping suppression" of subscription television accomplished by the act involved there with the rules upheld in *National Broadcasting Co. v. United States*, *supra*, which were designed "to avoid practices which would hinder growth of new networks and would deprive the listening public in many areas of service and would deprive local stations of much of their choice of programs," 411 P.2d at 298-99.

CATV systems are engaged in interstate communication by wire and by radio. They are an integral part of the television broadcast system. They are subject to direct regulation by the FCC. The Commission is required to exercise its regulatory powers to further the "public interest" in "the larger and more effective use of radio," Section 303(g). "The interest of the listening public in better and more effective service is paramount." *Carter Mountain Transmission Corp. v. FCC*, *supra*, 321 F.2d at 362. Indeed, the distant signal rules are expressly designed to advance true freedom of speech—the freedom of all the people, rich and poor, urban and rural, to be exposed to the widest possible variety of both national and local news, viewpoints and entertainment. In the expert judgment of the FCC that freedom—and the correlative right of broadcasters to present the news, viewpoints and entertainment—would be injured by unchecked development and expansion of CATV carrying distant signals. For this Court to strike down distant signal regulation on First Amendment grounds would require the Court to conclude that the Commission's judgment was totally arbitrary and unreasonable. Intervenor respectfully suggest that the Court should not and cannot reach such a conclusion. *Cf. Associated Press v. United States*, *supra*, 326 U.S. at 20:

"It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possi-

ble dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society . . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."

**V. ADOPTION OF SECTION 74.1109 DID NOT VIOLATE SECTION 4 OF THE ADMINISTRATIVE PROCEDURE ACT.**

Petitioners argue that Section 74.1109, which authorizes the interim order being reviewed here, is illegal because it was adopted without observance by the Commission of the requirements of Section 4 of the Administrative Procedure Act. It is asserted that there was no notice that such a rule might be adopted and that petitioners were deprived of the opportunity to "present arguments in opposition" to its adoption.

This contention can and should be rejected because, in all the voluminous pleadings filed by petitioners below, this issue was not raised in the proceeding before the Commission. See Section 405 of the Communications Act. Nor does it appear in the petition for reconsideration of the rules and the *Second Report and Order* filed by Mission, which is now pending before the Commission, or in the "Statement of Position" (R. 363-76), filed by Southwestern in this proceeding, which the Commission is considering in connection with the petitions for reconsideration (R. 583).

The contention is also lacking in merit, apart from its lack of timeliness. The fact that petitioners still have not made to the Commission any of the "arguments in opposition" to Section 74.1109 which they

claim they were illegally denied the chance to make shows that this contention is an empty abstraction.

In the *Notice of Inquiry and Notice of Proposed Rule Making*, 1 F.C.C. 2d 453, issued April 23, 1965, the Commission divided the CATV rule making into two parts. Part I was to be expedited and would deal, insofar as relevant here, with interim solutions to the distant signal problem while the longer range inquiry in Part II was underway. The *Notice* expressly "put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not." 1 F.C.C.2d at 477. The nature of these proposed rules had been indicated in earlier portions of the *Notice*. The Commission invited comment on possible measures to govern the "conditions under which CATV should be permitted to operate in areas [like San Diego] with potential for independent stations." In the interim, applications for microwave facilities to relay television signals to CATV systems in such areas would not be granted without "a clear and full showing that in the particular circumstances a grant would not pose a substantial threat to the development of independent UHF service in the area." Comments were also invited on an interim proposal to apply the same policy to non-microwave CATV systems. An example, but only an example, of this proposal was a rule prohibiting extension of the signal of a television station beyond its Grade B contour into an area with potential for independent stations without the showing microwave applicants would have to make. 1 F.C.C.2d at 471-72.

The Association of Maximum Service Telecasters, Inc. ("MST"), which had been one of the early pro-



ponents of direct FCC regulation of CATV, filed "Part I" comments regarding this proposal. Its comments received wide publicity. MST urged that the Commission adopt two kinds of interim rules to deal with the importation of distant signals. First, MST proposed a general prohibition on CATV extension of stations' signals beyond their Grade B contours except in particular limited circumstances. Second, because the Grade B contour did not appropriately define a distant signal for purposes of the policy behind the distant signal regulation, MST proposed that the Commission establish procedures to limit CATV importation of signals from one market into another, in appropriate circumstances, even where the system operated within the Grade B contours of the stations in the distant market.<sup>28</sup>

Intervenor Midwest also filed comments in the rule making proceeding. Midwest focused sharply on the fact that CATV systems in the San Diego area were carrying the signals of Los Angeles stations and showed that if the practice were permitted to continue and increase the result would threaten existing and proposed television broadcast service in the San Diego area. Midwest's comments also incorporated by reference the comments of MST, of which Midwest's San Diego station is a member, and proposed that the Commission's interim distant signal rules be applicable as of April 23, 1965.<sup>29</sup>

Thus there was clear notice in the comments of proposed interim rules that would limit or prohibit the carriage of Los Angeles signals by petitioners' CATV

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<sup>28</sup> Relevant excerpts from the MST comments are reproduced in the Appendix.

<sup>29</sup> Midwest's comments are also excerpted in the Appendix.

systems in the San Diego area, either by a general prohibitory rule applicable to carriage of non-Grade B signals or by special procedures relating to carriage of signals from other markets whether or not they were Grade B signals. And Midwest expressly proposed that the rule be applicable as of April 23, 1965. This put petitioners on notice that the Commission might by rule direct any new system starting operations after that date to discontinue operating; also, any substantial expansion of an existing system after April 23 would be required to cut back to conform to the rule. The interim rules and policies actually adopted in the *Second Report and Order* were less stringent than these proposals.

Notice of a counter-proposal made by a participant in a rule making proceeding is notice within the meaning of the Administrative Procedure Act. *Owensboro on the Air, Inc. v. United States*, 262 F.2d 702 (D.C. Cir. 1958), *cert. denied*, 360 U.S. 911 (1959). Moreover, petitioner Trans-Video had actual notice of the Midwest comments, for it filed comments expressly replying to them.<sup>39</sup> Thus, wholly apart from the fact that similar proposals were later made by MST and Midwest in their so-called Part II comments, which were also before the Commission while it was considering the rules ultimately adopted in the *Second Report and Order*, petitioners had notice of proposed rules that were more stringent than the rules the Commission adopted. Nor can petitioners complain that the rules are not labelled "interim" rules. This too is a formalistic objection devoid of all substance. All

<sup>39</sup> Trans-Video is the parent of petitioners Mission and Pacific and operates their CATV systems. It also operates the CATV system owned by petitioner Southwestern.

rules, whether "interim" or "final," are subject to change, and the Commission expressly said the CATV rules will be revised or terminated, as further experience indicates. 2 F.C.C.2d at 786.

Section 4(a) of the Administrative Procedure Act requires that the notice of proposed rule making include "either the terms or substance of the proposed rule or a description of the subject and issues involved." This provision must be interpreted in practical, not abstract, terms. "Surely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again. If such were the rule the proceedings might never be terminated." *Logansport Broadcasting Co. v. United States*, 210 F.2d 24, 28 (D.C. Cir. 1954); see *CAB v. State Airlines, Inc.*, 338 U.S. 572 (1950); *Chicago St. P. M. & O. Ry. v. United States*, 322 U.S. 1 (1943); *Florida Economy Advisory Council v. FPC*, 251 F.2d 643, 648 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 959 (1958); *City of Dallas v. CAB*, 221 F.2d 501, 504 (D.C. Cir. 1954), *cert. denied*, 348 U.S. 914 (1955). Even without regard to the proposals of MST and Midwest, petitioners' argument should be rejected, for the Notice was "as specific as the Commission could have made it at the time." *Wilson & Co. v. United States*, 335 F.2d 788, 795 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965). The Commission was not required to allow the public interest to suffer through more delay in adopting CATV rules.

### CONCLUSION

The order under review was within the Commission's power to issue. It is adequately supported by proper findings. The CATV rules on which the order

is based are also within the Commission's statutory authority and neither the rules nor the order contravenes the First Amendment. Finally, Section 74.1109 does not violate Section 4 of the Administrative Procedure Act.

Accordingly, the order should be affirmed.

Respectfully submitted,

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#### Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN E. VANDERSTAR

## APPENDIX

Excerpts from Comments of Association of Maximum Service Telecasters, Inc., submitted on July 26, 1965, to the Federal Communications Commission in "Part I" of the rule making proceeding in Docket Nos. 14895, 15233 and 15971:

**C. Effective Interim Rules Should be Established Immediately and They Should Apply to Franchised and Operating, as Well as Prospective, CATV Systems.**

100. The surge of CATV activity which we have described has continued unabated notwithstanding the Commission's actions of April 23, its statement to local franchising authorities in paragraph 50 of the April 23 *Notice of Inquiry* that they should proceed with caution and its warning to all existing and prospective CATV operators in paragraph 65 of the *Notice* that CATV operations may be subject to comprehensive regulation. Indeed, MST knows, and asserts without fear of contradiction, that various CATV interests since April 23 have been urging local authorities to grant franchises as fast as possible before the Commission issues further rules. Since April 23, CATV applications have been filed in at least 350 communities and granted in more than 200 communities. (*Television Digest CATV Activity Addenda*, April 26-July 19, 1965).

101. The need for immediate implementation of interim procedures to produce order out of chaos is clear and compelling. Hence, MST strongly supports the immediate adoption of interim rules, applicable to *all* CATV systems, designed to ensure that CATV does not jeopardize the growth and development of free television broadcast service pending adoption of effective long-range regulations to govern CATV.

102. There are a number of considerations which persuasively point to the nature and scope of the relief which is required. *First*, UHF development is important, regardless of the size of the market. *Second*, UHF development is important, whether it will provide additional tele-



vision service to a vast metropolis or whether it will provide the first television service to a small city, or whether it will provide service to rural areas. *Third*, paragraph 49 of the *Notice of Inquiry* focuses on CATV activity in communities to which UHF channels are assigned and not on the entire service areas of present and potential stations. Moreover, paragraph 49 appears to focus unduly on a showing by a particular CATV system as to the effect of the operations of that system in the particular community in question on the maintenance and development of UHF service. But, to attempt to determine whether the importation of distant signals by a *single* CATV system in a *single* community would pose a substantial threat to UHF television broadcast service without regard to the total number of CATV systems operating, franchised or for which applications are pending or with respect to which there is other evidence of CATV activity within the entire service area of a given existing or prospective station is to approach the situation with blinders. The effect of any one system can be minimal, while as Mr. Frederick Ford put it so cogently (see paragraph 91 above), the total impact would be such that: "Ultimately, the ability of the station to adequately serve the public or even to survive could become questionable." *Fourth*, what is involved here is an *interim* policy. As the Commission put it, its "responsibilities are not discharged . . . by waiting 'until the bodies pile up' " before recognizing that a problem exists and doing something about it (FCC 65-335, para. 48(3)). While the Commission is deciding, as it will in the subsequent stages of these proceedings, what comprehensive regulations are required of CATV, it has no alternative but to make sure that the house does not burn down before the fire engine is built.

103. The most direct and effective interim rule would provide that, while the Commission is proceeding with the formulation of its final rules to deal comprehensively with long range CATV regulation, no CATV system shall be

permitted to extend the signal of any television broadcast station beyond its Grade B contour except upon a clear and full showing (a) that there are special circumstances, for example, that the community is remote and isolated and does not have, and cannot be expected to receive in the future, direct off-the-air local or area television service; *and* (b) that the operation of the CATV system, taken together with the operations of all other CATV systems operating or franchised or which are being proposed in the area in question, would not pose a substantial threat to the maintenance or the expansion of any existing UHF station or the development of new UHF service in the area. For the purposes of this rule, in all situations the coverage of a UHF station, existing or potential, should be treated as if the station were operating with the maximum facilities permitted by the rules of the Commission. Such an approach to coverage would encourage both the improvement of existing UHF facilities and the use of maximum facilities by potential new UHF stations.

104. The foregoing rule should be made effective immediately upon its publication<sup>1</sup> and should be made applicable to all CATV systems proposed on or after April 23, 1965, the date of the release of the Commission's *First Report and Order* and its *Notice of Inquiry and Notice of Proposed Rule Making*. Any CATV system which has commenced construction or operations or which was in existence prior to April 23 but which has substantially expanded its lines or the number of its subscribers in the community in question or has increased the number of stations carried since April 23 should be required to modify its operations to the extent necessary to bring it into conformance with the interim rule. Such action by the

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<sup>1</sup> Section 4(c) of the Administrative Procedure Act provides that any rule issued by an administrative agency may be made effective as of the date of its publication "upon good cause found and published with the rule". In view of the urgency of the situation, the Commission clearly has good cause to make the rule effective as soon as possible.

Commission is entirely reasonable in light of its admonition in the *Notice of Inquiry* to all existing and prospective CATV operators:

“[W]e believe it appropriate, as requested by one of petitioners, to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not.” (FCC 65-334, para. 65).

In this connection, it should be noted that various aspects of the regulations indicated by the Commission go further than is proposed here. Paragraphs 51, 52 and 53 of the *Notice of Inquiry* dealt with general and final rules on the extension of television signals by CATV as well as so-called “leap-frogging”.

105. An alternative but much less satisfactory approach in view of the CATV activity since April 23 would be to apply the interim rule (a) to all CATV systems which become operative on or after the publication of the rule, regardless of the date of franchise, and (b) to any CATV system operating on the date of publication of the rule which thereafter substantially expands its lines or the number of its subscribers or which increases the number of stations carried.

106. In any event, whatever the timing, the Commission should make clear that to the extent it does not require any existing system to cut back operations which are inconsistent with the interim rule, the Commission does not thereby intend in any way to extend any “grandfather” rights to such CATV systems and that such operations will be subject to modification or curtailment as may be required by the final rules adopted by the Commission.

#### IV. THE COMMISSION SHOULD BY SPECIAL RULES PROVIDE SUMMARY PROCEDURES TO HANDLE REQUESTS FOR OTHER OR DIFFERENT TREATMENT THAN PROVIDED FOR IN THE RULES.

109. The Commission should adopt a specific rule providing for summary, non-hearing, procedures to handle claims for exceptions from any particular provision of the CATV rules and to handle requests for other or different treatment than is provided for in the rules, including the carriage, non-duplication and interim UHF rules. Such procedures would, for example, allow a party to whom the rules directly apply to seek a special exception from the rules or other special relief upon a showing of special circumstances or conditions justifying such treatment and would allow any other party affected by the rules to obtain an exception or special relief upon a similar showing.

110. In its *Notice of Further Proposed Rule Making and Notice of Proposed Rule Making* in Docket Nos. 14895 and 15233, the Commission proposed adoption of specific procedures whereby a party could seek special relief by showing that provisions of the then proposed CATV rules should not apply in the particular circumstances of the case (FCC 63-1128, paras. 10-11 and proposed Sections 11.557 and 21.711). However, in its *First Report and Order* the Commission has deleted these proposed provisions, stating:

“The Communications Act and our normal rules prescribe the procedures to be followed in considering applications for permits, licenses and other authorizations. Further, we have provided generally for the consideration of requests for waiver of any rule. (See Section 1.3 of the Rules.)” (FCC 65-335, para. 155).

However, neither existing procedures under the Act and the Commission's normal rules relating to applications nor the general waiver provision are adequate.

111. The present procedures for considering applications for permits, licenses and other authorizations would at the most only be applicable in the case of applications for microwave authorizations intended to serve CATV systems. Since the Commission has not asserted any general licensing authority over CATV systems, these procedures would not be applicable directly to CATV systems themselves and the Commission is proceeding to regulate CATV systems directly.

112. Nor does Section 1.3 of the existing rules afford an adequate procedure. This provision relates solely to the waiver of a rule. At best, it is doubtful that any party other than one to whom a rule is directed could request such a waiver. Thus, it is questionable whether a local broadcast station, for example, could seek the waiver of a rule which required or allowed a CATV system to carry the signal of another station in lieu of its signal. Moreover, even if it could do so, it is difficult to see how the relief would be adequate since Section 1.3 does not appear to contemplate anything other than a waiver or a *non-application* of the rule in question, whereas *affirmative* relief may be required. For example the Commission recognizes that, with respect to its system of priorities among stations as to carriage and non duplication, it may be necessary to "allow appropriate" relief upon the basis of a showing by one station that its signal should be afforded priority of treatment by the CATV system over the signals of another station which provides a calculated signal of equal or even higher grade (FCC 65-335, paras. 91(c) and 99, n. 55).

113. For such reasons, a procedure should be established by specific rule under which any party affected by the CATV rules could seek an exception or other appropriate special relief or treatment. We emphasize, however, that the procedures established for this purpose should require adequate notice to all interested parties, but should be



summary in nature and should be confined to written submissions by the parties concerned, except where the Commission concludes that more is required in any particular situation. Burdensome and time consuming evidentiary hearings on these matters as a matter of course would not serve the public interest and, moreover, are not necessary in order to provide effective relief where relief is appropriate.

\* \* \*

**Excerpts from Comments of Midwest Television, Inc., submitted on July 26, 1965, to the Federal Communications Commission in "Part I" of the rule making proceeding in Docket Nos. 14895, 15233 and 15971:**

\* \* \*

4. By its actions of April 23, the Commission has taken a first major step forward in developing comprehensive regulations to deal with the CATV problem. With certain exceptions, noted herein, Midwest supports the Commission's actions. Contemporaneously with the filing of these Comments by Midwest, the Association of Maximum Service Telecasters (MST), of which Midwest stations WCIA and KFMB-TV are members, is filing comprehensive Comments in these proceedings. Midwest is familiar with MST's basic position on CATV and, except as otherwise noted herein, Midwest concurs in the views expressed and proposals made by MST in those Comments. Accordingly, these Comments will be confined to certain aspects of these matters.

\* \* \*

15. The Commission has before it ample evidence to support its conclusion that the adverse effects of duplication of programming alone (irrespective of additional audience fragmentation which results from importation of multiple non-duplicating signals from distant stations) pose a real—and growing—threat to the continued health of local and area television broadcasting. However, the San Diego area survey referred to above provides additional and dramatic evidence of the effect of program duplication.

16. The San Diego area is presently served by three VHF stations which provide the area with the programs of all three networks.<sup>1</sup> CATV systems in operation there, however, none of which employs microwave, carry the signals of all seven commercial VHF Los Angeles stations. Non duplication treatment is not afforded the local San Diego stations, but they are carried on the cable. Those local stations suffer a severe loss of audience when their programs are duplicated on the cable. During the prime evening hours of 7:30 to 11:00 P.M., when most of the programs broadcast by the three San Diego area stations were network programs, those stations accounted for between 88 per cent and 97 per cent of total viewing time of non-CATV subscribers surveyed in different areas. Among cable subscribers surveyed, the local stations' share of viewing time shrank to 62 per cent during the same period.

17. More detailed analysis tells the same story. Of those surveyed who were not CATV subscribers and who watched "Beverly Hillbillies" on June 23, 100 per cent saw it on the San Diego CBS affiliated station; of cable subscribers, only 69 per cent did. 96 per cent of non-subscribers who watched "Wednesday Night at the Movies" saw it on the San Diego NBC affiliated station; only 77 per cent of the cable subscribers did. During the hour from 9:00 to 10:00 P.M., Sunday through Wednesday, each program broadcast by each of the San Diego area stations were simultaneously broadcast and carried on the cable by a Los Angeles station. Among those interviewed who watched these duplicated programs, 93 per cent of non-subscribers saw them on the local stations, whereas only 77 per cent of cable subscribers did so.

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<sup>1</sup> Midwest's station KTMB-TV is a CBS affiliate. KOGO, San Diego, is an NBC affiliate. The third station, XETV, an ABC affiliate, is located in Tijuana, Mexico, just a few miles from San Diego.

## 2. The Critical Situation in San Diego.

40. Midwest's concern with the unrestrained proliferation of CATV is by no means confined to central Illinois. In Southern California, within the service area of Midwest's station KFMB-TV, San Diego, CATV has been growing at great speed. The first system in that area was franchised in March of 1963. Since then, seven additional systems have been franchised—one in September 1964 and two in just the last three months. All eight systems are within the Grade A contour of KFMB-TV, which falls within the metropolitan San Diego area; four of the systems are located in San Diego itself. System construction does not of course begin until sometime after grant of a franchise, and four of the eight San Diego area CATV systems are not yet operative (though two of the four are expected to begin operating momentarily). Figures as to the number of subscribers these systems have secured are not public and, although Midwest has tried to obtain current data, the information was not made available. As of February 1965, the number was roughly estimated at approximately 10,000 homes. However, the installation of new cable has been proceeding at a furious pace in recent months. Midwest engineering personnel recently counted drops in a part of San Diego where CATV had been available for only three months. Of 159 homes in that area, 58 were wired for CATV—and this is an area where all three local stations can be satisfactorily received. In the June 1965 survey made for Midwest in the San Diego area by an independent research organization,<sup>1</sup> 300 cable subscribers were interviewed; 43 per cent had been subscribers for less than three months.

41. Nor have the Commission's admonitions to local authorities to proceed with caution curbed this activity thus far. Only recently the San Diego County Supervisors approved a procedure for licensing CATV's in the unin-

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<sup>1</sup> See footnote 2, p. 5, *supra*.

corporated areas of the county. (*Broadcasting*, July 5, 1965, p. 80).

42. The three local VHF stations which serve San Diego already face serious audience fragmentation as a result of the importation of both network-owned and independent stations from Los Angeles and face the threat of yet more severe effects in the immediate future as operating systems expand their operations and as CATV systems which are franchised but not yet operating commenced operations. All of this is true despite the fact that the stations are network affiliated, are well-established and have strong ownership and management, and despite the further fact that the San Diego market is a substantial one. Again, however, as in central Illinois, the most immediate effects will be upon the development of new UHF service. Construction permits are outstanding for two new commercial UHF stations to operate on Channels 39 and 51 in San Diego. Unless effective action is taken by the Commission, it is doubtful that either of these authorized UHF stations will go on the air or, if they do, that their operations will be viable.

43. There can be no doubt of the threat which this intensified activity poses to the development of UHF service in San Diego. The impact of rapidly expanding CATV on these *proposed* UHF stations can be clearly seen from the severe audience losses which the three *existing* VHF network affiliated stations face, as reflected in the June 1965 survey. Three hundred cable subscribers were asked, "Which channel do you now use most?" Only 49 per cent named a San Diego channel; fully 55 per cent named a Los Angeles channel.<sup>1</sup> The same question was put to two groups of non-CATV subscribers (150 in areas where there is CATV and 150 in areas where this is no CATV). San Diego stations were named by 108 per cent and 94 per cent,

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<sup>1</sup> An additional 10 per cent made no choice. Percentages total to more than 100 per cent because some multiple answers were given.

respectively, while Los Angeles stations were named by only 5 per cent and 11 per cent. The survey also asked about stations used next most and third most frequently. The results are dramatic:

*Per Cent of Respondents Who Named A  
San Diego Station As One of the Three  
Stations That Were Used Most*

(Station Named)	Non-Subscribers	CATV Subscribers
KFMB-TV	90%	44%
KOGO	89%	48%
XETV	77%	29%

44. Perhaps even more striking, with respect to the impact on the proposed independent UHF San Diego stations, is the fact that 25 per cent of the 300 CATV subscribers interviewed named a Los Angeles *independent* station as the channel they used most; only 1 per cent and 2 per cent respectively, of the two groups of non-subscribers did so. Moreover, 56 per cent of the CATV subscribers (as compared with 11 per cent of non-subscribers) named at least one Los Angeles independent as one of the three stations used most.

45. Other statistical approaches likewise reveal that independents in communities like San Diego will have a rough go, at best. During the one-hour period from 5:00 to 6:00 in the afternoon, Monday through Friday, there was no duplication by Los Angeles stations of the programs broadcast in San Diego. In other words, all stations in both cities could be considered "independents" during that period, and a cable subscriber could watch any one of *ten* different programs. The audience lost to the Los Angeles stations was staggering. Among non-subscribers surveyed, 95 per cent of those who watched television during that hour watched one of the San Diego stations. Of cable subscribers, however, the three San Diego stations accounted for only 48 per cent of total viewing; the Los



Angeles stations accounted for 52 per cent—16 per cent for the network stations, 36 per cent for the independents. One Los Angeles station alone (an independent) accounted for 20 per cent, surpassing two of the three San Diego stations (which had 12 per cent and 11 per cent, respectively). Even during the 9-10 P.M. period on Sunday through Wednesday, when all San Diego programs were network programs duplicated by Los Angeles stations, the Los Angeles independents accounted for 16 per cent of viewing time. In short, the new independent UHF stations proposed for San Diego will, in homes that are or will be CATV subscribers, be attempting to enter a market where, at various times of the day, they will be attempting to compete for audience with ten other stations offering from seven to ten different programs to the public.

46. The foregoing brief sketch of CATV activity is only illustrative of what is increasingly confronting present and prospective local and area television broadcast stations in communities throughout the nation. When it is considered that this surge of CATV activity has, until recently, been without regulatory guidance or effective rules to protect the public interest in free, local and area television broadcast service, the need for immediate, effective regulatory action by the Commission becomes readily apparent. Nor have the Commission's actions of April 23, by themselves, significantly deterred this surge of CATV activity thus far. It is noteworthy that in central Illinois the proposals for CATV in Springfield, Peoria, Champaign and Urbana, among others in the area, *have all been announced since April 23*. Indeed, at least eight new CATV operators filed applications for local franchises in central Illinois *during the first two weeks of July*. In the San Diego area, the last few months have seen a flood of new CATV hook-ups. As already pointed out, the survey revealed that as of late June *43 per cent* of the cable subscribers interviewed had been subscribers *for less than three months* and Midwest engineering personnel counted 58 CATV homes in a

159-home area in San Diego where CATV had been available for only *three months*.

47. Moreover, it is essential that such interim action be made applicable to all CATV systems irrespective of whether they use microwave. The importance of extending interim rules to all CATV systems regardless of whether microwave facilities are used is indicated by the fact that of some 1,257 CATV reported to be operational in late 1964, only 273—less than one-fifth—utilized microwave facilities (Seiden, *An Economic Analysis of CATV Systems and The Television Broadcasting Industry*, p. 50, 1965). Even without the use of microwave, CATV systems can import distant signals from a considerable distance by using advantageous receiving sites, high towers, elaborate receiving antennas and elaborate amplification systems. San Diego is an example of a situation where importation of distant signals does not depend upon the use of microwave; the CATV systems now operating there do not rely upon microwave to import the signals of the Los Angeles stations.

\* \* \*

### C. A Proposed New Interim Rule.

52. Accordingly, Midwest proposes that the Commission, by interim rule, issue a general stay against *all* further CATV activity where the CATV carries or proposes to carry the signal of any station beyond its Grade B contour. While there should be such a general stay of all further CATV activity, Midwest believes it would be appropriate for the Commission to provide for an appropriate waiver of the stay in *limited* circumstances upon a special showing by the CATV system of public need for service. However, the Commission should *not consider* waiving such a stay except in those cases where the CATV system would serve a "white" area which is presently without any television service. In these cases the Commission should weigh the needs of the community against the

possibility that CATV operations might impair the development of any existing, authorized or applied for local television station—UHF or VHF, independent or network-affiliated, commercial or educational—in the area. It should further consider the likelihood of off-the-air service to the community in question by translators or other low-powered stations.

53. The issue involved here is *not* a matter of making a final, complete disposition with respect to CATV regulation. The issue here is what action is required in order to maintain the orderly growth and development of television broadcasting during the pendency of these proceedings. This is not a situation where television service to the public would be frozen. Quite the contrary, the swift and orderly growth of UHF television will continue vigorously—even more so than if the Commission were to allow CATV to continue to expand “willy nilly” without direction, order, or purpose.

54. The stay rule proposed should become effective immediately upon its publication. It should be made fully effective with respect to (a) all subsequent CATV proposals, (b) all CATV systems which have franchise applications pending, and (c) all CATV systems for which franchises have been granted but which are not in operation. Any CATV system which was in existence prior to April 23, 1965, but which has substantially expanded its lines or the number of its subscribers or has increased the number of stations carried since that date should be required to modify its operations to the extent necessary to bring it into conformance with the interim rule. The April 23, 1965, cut-off date is entirely appropriate because that is the date when the Commission issued its *Notice of Inquiry and Notice of Proposed Rule Making* in Docket No. 5971, where it “put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of

the nature indicated, whether microwave is used or not.” (FCC 65-334, para. 65).

55. It is essential that the interim rule be made applicable to *existing* systems. The interim rule will be totally ineffective in many cities if non-conforming existing systems are allowed to continue to expand or extend their operations, string new cable, increase the number of subscribers, add outside stations, or in any other way expand their facilities or services. The continued expansion of non-conforming systems already constructed or operating can seriously damage existing local television operations, and could well foreclose the development of new UHF station operation forever. San Diego is an example of just such a situation. As previously mentioned, of the eight CATV systems in that area which are franchised, four are presently in operation and are rapidly expanding their lines and subscribers.

56. Some of the damage in San Diego and elsewhere had already been done by April 23. But further CATV expansion has been pursued with the greatest vigor since that date, and the damage increases in proportion. And this has occurred in the teeth of the Commission's clear announcement in the Notice. The Commission should make plain that it means what it said. To advert to a useful analogy, the Commission has explained that the congressional policy behind requiring permits to *construct* broadcast stations was “to discourage applicants [for operating licenses] from making large investments and using such investments as ‘improper pressure’ on the licensing authority.” *W.S.A.V., Inc.*, Docket Nos. 10517 and 10518, 10 R.R. 402, 403j (1955). In the circumstances, a rollback to the situation that existed on April 23, 1965, is singularly appropriate.

\* \* \*





IN THE  
**United States Court Of Appeals**

FOR THE NINTH CIRCUIT

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**No. 21184** ✓

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In the Matter of  
**FIKE PLUMBING & HEATING CO., INC.,**  
Bankrupt.

**TUCSON HOUSE CONSTRUCTION COMPANY AND**  
**ROBERT E. MCKEE GENERAL CONTRACTOR, INC.,**  
*Appellants,*

**v.**

**WALTER E. FULFORD, as Trustee in Bankruptcy of**  
**FIKE PLUMBING & HEATING CO., INC.,**  
*Appellee.*

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**On Appeal From the United States District Court for the**  
**District of Arizona**

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**BRIEF OF APPELLANTS**

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*Appellee.*

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**On Appeal From the United States District Court for the  
District of Arizona**

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**BRIEF OF APPELLANTS**

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**JURISDICTIONAL STATEMENT**

This is an appeal from the Order Affirming Referee's Order entered on May 20, 1966, by the United States District Court for the District of Arizona (R. 155).<sup>1</sup> The underlying action was

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<sup>1</sup> The record in this case consists of a volume of Court filings entitled Transcript of Record plus two reporters' Transcripts of Hearings. The Transcript of Record has been numbered consecutively from the first page through the last so that, e.g., an item on page 150 will be cited "R. 150."

brought by the trustee on a petition for turnover order before the Referee in Bankruptcy (R. 1), which petition was subsequently amended (R. 40). The trustee's petition was at all times resisted by the appellants herein, who filed a motion to dismiss the Order to Show Cause Why Turnover Order Should Not Be Entered (R. 4). It was contended by the trustee that the Bankruptcy Court had jurisdiction under 11 U.S.C. Sec. 11, and appellants in subsequent oral argument before the District Court consented to the summary jurisdiction of the Bankruptcy Court in order that this case might be decided upon its merits.

On June 8, 1965, the Referee entered an order taking appellants' motion to dismiss under advisement (R. 38). A hearing was held on these matters September 20, 1965 (T. I),<sup>2</sup> and final arguments were heard on November 5, 1965 (T. II). On March 16, 1966, the Referee in Bankruptcy granted the trustee's petition for turnover order (R. 67). Appellants then filed a Petition for Review in the United States District Court for the District of Arizona (R. 76). After a hearing was held in the District Court on April 29, 1966,<sup>3</sup> on May 20, 1966 the District Court entered an order affirming the Referee's order (R. 155). The District Court had jurisdiction to review the Referee's order under 11 U.S.C. Sec. 11.

This appeal from the Order Affirming Referee's Order (R. 155) was taken May 31, 1966, appropriate bond being filed the same day (R. 157, 158). This Court has jurisdiction under 11 U.S.C. Sec. 47.

### STATEMENT OF THE CASE

This is a suit brought by the trustee on a petition for turnover

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<sup>2</sup> The record contains two transcripts of proceedings. The transcript of proceedings of September 20, 1965 will hereinafter be designated as T. I; the transcript of the final argument of November 5, 1965 will hereinafter be designated as T. II.

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<sup>3</sup> There is no transcript of proceedings available for this hearing.

order to recover the sum of \$59,587.45 which the trustee claimed belonged to the bankrupt estate.

#### **A. The facts of this case.**

On November 17, 1964, Fike Plumbing & Heating Co., Inc. was adjudicated a bankrupt on a voluntary petition (R. 1, 40). Prior to its adjudication, Fike had been engaged in the business of a plumbing subcontractor.

On August 6, 1962 Fike entered into a subcontract (Trustee's Exhibit 3)<sup>4</sup> with the Tucson House Construction Company for the performance of plumbing work on the Tucson House, an apartment building under construction in Tucson, Arizona. The prime construction contract for the Tucson House project (Trustee's Exhibit 1) was between Tucson Title Insurance Company, legal owner under Trust No. 10578 with the equitable owners initially being Bernard W. Robbins and Raymond S. Schiff, and Tucson House Construction Company, an alleged joint venture composed of Robert E. McKee General Contractor, Inc., Robbins and Schiff.

As a practical matter, however, McKee was the general contractor (T. I 5), and the "joint venture" agreement (Trustee's Exhibit 2) was not entered into for the purpose of creating such an entity, but was for the purpose of giving Robbins and Schiff an identity of interest with the contractor, McKee, in order to obtain more favorable F.H.A. financing (T. I 54-57). Most of the elements required for the forming of a joint venture were not present (R. 28-31), and in addition, the agreement provided that McKee would guarantee the construction of the project at a fixed price, that McKee would have complete control, and would indemnify Robbins and Schiff from claims such as Fike's (T. I 57-64). The agreement was nothing more than a contract between

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<sup>4</sup> There were a number of exhibits introduced in evidence at the September 20, 1965 hearing which are a part of the record on appeal. These will be identified by the exhibit number affixed to it at the hearing in the Bankruptcy Court. See Appendix A to his Brief for a full list of the exhibits.

Robbins and Schiff, as the owners, and McKee, as general contractor, which outlined their contractual arrangement. It did, however, have the effect of making Robbins and Schiff also liable with McKee for the payment of the subcontract price. National Surety Company was Fike's surety on its subcontract bond (Trustee's Exhibit 4) to Tucson House Construction Company.

The subcontract on the Tucson House project provided, among other things, that Fike would pay for all of its labor and materials and guaranty its work to be free from defects for a period of one year from the date of acceptance by the owners of the completed contract (Paragraph 27 of Trustee's Exhibit 3). The subcontract also provided that the final retention monies owing to Fike would not become due until "30 days after completion and acceptance of subcontractor's work by the owners and receipt of final payment from the owners." (Page 1 of Trustee's Exhibit 3; T. I 6-7, 31).

While Fike was performing this contract, it entered into another subcontract (Respondent's Exhibit 8) on June 5, 1963 to perform plumbing work on the John C. Lincoln Hospital in Phoenix, Arizona. This subcontract was with the McKee corporation individually as contractor. Fike's surety on this subcontract was Reliance Insurance Company which is the successor in interest to Standard Accident Insurance Company (Trustee's Exhibit 5). The subcontract provided, among other things, that Fike would pay for all its labor and materials used on the project and would indemnify McKee from any and all liability, damage, claims and expenses resulting directly or indirectly from the performance of the contract.

By the terms of McKee's contract (Respondents' Exhibit 7) with the owner, John C. Lincoln Hospital, Inc., McKee became obligated to pay all claims on the Lincoln Hospital project. In order to insure this, the owner required McKee to furnish a bond (Respondents' Exhibit 7) by which McKee and its surety, General Insurance Company of America, became jointly and sever-



ally liable for unpaid claims for labor and materials on the Lincoln Hospital Project, including that furnished to Fike under its subcontract.

Fike was formally declared to be in default on the Lincoln Hospital subcontract by McKee as of November 16, 1964 (Respondents' Exhibit 9; T. I 114), the day before Fike filed its bankruptcy petition. At the time of its default, Fike's portion of the work was not complete, and it owed materialmen, for materials used in the project, in excess of \$50,745.12. McKee called upon Fike's surety, Reliance, to complete the contract and pay Fike's outstanding bills. Reliance agreed to and did complete Fike's work, but it refused to pay the outstanding bills, contending that McKee had an obligation to use the monies owing to Fike on the Tucson House project, by way of offset, to pay these bills (T. I 39, 117-118).

Fike had completed its work on the Tucson House project, except for the payment of some material bills and its guaranty under the subcontract, in January or February 1964 (T. I 64). Because Fike had not been fully paid, and at the request of McKee who was trying to obtain final payment from the owners (T. I 119), Fike, on August 24, 1964, filed a Notice and Claim of Lien on the Tucson House project in the office of the Pima County Recorder (Trustee's Exhibit 6). No copies of this lien were ever served upon the owners (T. I 123), as required by the Arizona statutes,<sup>5</sup> and neither the owners nor McKee became aware of the lien until December, 1964 (T. I 10, 120-123; Respondents' Exhibit 11).

At the time of Fike's default on the Lincoln Hospital project and its subsequent adjudication in Bankruptcy, there was still owing to Fike on the Tucson House subcontract some \$59,587.45, although Fike was not yet entitled to this money (T. I 11, 33-34, 64-65). Fike's surety on this project, National Surety, directed McKee to withhold payment of this sum to Fike or the trustee until all of Fike's bills had been paid and its warranty obligations

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<sup>5</sup> Arizona Revised Statutes, § 33-993.

had been performed (Respondents' Exhibits 1 & 2; T. I 65-70, 78).

The project was accepted by the owners (Robbins and Schiff) and final payment made to the Tucson House Construction Company account (McKee) on December 11, 1964 (T. I 12). In order to receive this money it was necessary for McKee to put up a lien bond (Respondents' Exhibit 12), protecting the owners and the mortgage company from any liability attending Fike's lien, which the trustee would not formally release (T. I 119-120). This was a requirement of the title insurance company, which would not issue a title policy without it, and without the title policy, final payment could not have been made.

The final monies on this contract were placed in the Tucson House Construction Company account in an El Paso bank (T. I 19-20). From this account, which was under the exclusive control of McKee, McKee paid its own bills, and the unpaid bills of Fike on the Tucson House project, amounting to \$2,765.45, as well as other charges incurred by McKee in performing Fike's warranty obligations, which the Referee found to total \$1,375.87 up to September 20, 1965, exclusive of the lien bond premium (Respondents' Exhibit 10; T. I 80-81, 115-117). Since that date and prior to the expiration of the one year warranty period (T. I 78), other charges have been made against this account for warranty obligations, which amounts have heretofore not been presented to the Court.

On February 19, 1965 McKee transferred from the Tucson House Construction Company account \$50,745.12 to an account it had in its own name, and from this account it issued checks in payment of the majority (T. I 84) of Fike's obligations on the Lincoln Hospital project. In this manner McKee mechanically accomplished its set-off (T. I 29, 35-39, 43-44, 117-118).

#### **b. The instant proceedings.**

As noted, on the 16th day of March, 1965, the trustee filed his petition for turnover order and obtained the issuance of an

order directing McKee to show cause why all the monies remaining on Fike's contract on the Tucson House project should not be turned over to the Bankruptcy Court (T. 1). It was not until the 8th day of September, 1965, twelve days before the Referee's hearing, that the trustee saw fit to amend his petition to include Tucson House Construction Company as the other respondent (R. 40).

Evidence was presented before the Referee in a hearing on September 20, 1965 (T. 1), and final argument by counsel was presented before the Referee on November 5, 1965 (T. II).

On March 16, 1966, the Referee entered his order directing turnover of the proceeds to the trustee (R. 67), and appellants promptly filed a Petition for Review (R. 76) by the District Court. A hearing was held before the District Court on April 29, 1966, and on May 20, 1966 the District Court entered its order affirming the Referee's order (R. 155). The District Court's order affirmed the Referee's order in toto.

This appeal followed.

### **SPECIFICATION OF ERRORS RELIED ON**

1. The Referee and the District Court erred in granting the Trustee's Petition for Turnover Order, for the reason that appellants have a bona fide right of set-off.

2. The Referee and the District Court erred in that their Finding of Fact numbered 15, stating that the bankrupt did not default on the Lincoln Hospital project until after bankruptcy, and that the obligation to complete the unfinished job and to pay all unpaid charges with respect thereto was that of Reliance Insurance Company, was clearly erroneous; and they further erred in that they failed to include in the Findings of Fact or Conclusions of Law that Fike was obligated to McKee in connection with the Lincoln Hospital project.

3. The Referee and the District Court erred in Findings of Fact numbered 3, 5 and 14 to the extent that those findings declare

that a joint venture was formed, for the reason that such a finding amounts to a conclusion of law; and they further erred in apparently concluding that a "joint venture" had been formed, since the evidence clearly shows that a "joint venture" was never actually formed.

4. The Referee and the District Court erred in concluding that the debts in question are not mutual debts within the purview of Sec. 68 of the Bankruptcy Act, in view of the fact that the debts here in issue are Fike to McKee, and McKee (whether individually or severally) to Fike, *and they are mutual*.

5. The Referee and the District Court erred in apparently concluding that the set-off claimed by McKee, in its individual capacity, was against wrongtully obtained proceeds or trust proceeds, and could not be allowed, for the reason that the basis stated for said apparent conclusion was clearly inapplicable, and said apparent conclusion was not supported by the evidence.

6. The Referee and the District Court erred in that Finding of Fact numbered 11, that the owner was not prejudiced by the failure of the Notice and Claim of Lien to be served upon the owner, and Conclusion of Law 1 (b), that appellants did not have a legal right to receive the proceeds in question from the owner by reason of said Notice and Claim of Lien having been filed, were clearly erroneous, in view of the fact that said lien was completely invalid.

7. The Referee and the District Court erred in concluding that appellants had no legal right to retain the retention proceeds for the life of Fike's warranty of good workmanship, in view of the fact that Fike was unable to perform its warranty obligations.

8. The Referee and the District Court erred in apparently concluding that McKee secured payment of its debts from property transferred to it subsequent to the filing of the bankruptcy petition, and in not allowing McKee's claim of set-off, in view of the fact that McKee owed and owned the debts in question prior to the act of bankruptcy.

9. The Referee and the District Court erred in apparently concluding that Reliance Insurance Company was the real party in interest herein, and in concluding that the subrogation rights of Reliance were material to arriving at a decision in this case, for the reason that Reliance's interest in this case is totally immaterial to the validity of McKee's right of set-off.

10. The Referee and the District Court erred in concluding that appellants' claim was limited to a credit of \$2,765.45, stemming from payment of certain labor and supplier's claims, and to an additional sum of \$1,375.87, stemming from payment of certain warranty items, in view of the fact that McKee has suffered additional warranty expenses on Tucson House.

11. The Referee and the District Court erred in allowing the trustee interest, on the sum ordered to be turned over, to run from January 11, 1965, for the reason that McKee had a right to retain the retention proceeds until at least December 11, 1965.

12. The Referee and the District Court erred in allowing the trustee \$5,500 as a reasonable attorney's fee, for the reasons that there is no evidence in the record to support such an award, and that the Referee had no jurisdiction to make such an award.

### **SUMMARY OF ARGUMENT**

The one overriding issue to be resolved in this case is whether or not McKee is entitled to the right of set-off on the several debts in question. The trustee has admitted that if McKee, in its individual capacity, has a right to set-off the obligation owed it by Fike on the Lincoln Hospital project against the retention proceeds on the Tucson House project, then appellants should prevail on this appeal.

It is appellants' position that Fike is obligated to McKee on the Lincoln Hospital project by virtue of: (1) McKee's contractual obligations with the hospital; (2) McKee's obligations under its performance bond, which allows Fike's suppliers to seek



redress directly from McKee without joining Fike; (3) Fike's obligations under its subcontract with McKee; and (4) the statutory right granted to Fike's surety under the laws of the State of Arizona. Thus, the debt owned by McKee is owned in its individual capacity.

In considering the obligations arising out of the Tucson House project, appellants first of all contend that no true joint venture or partnership was formed, and that McKee, individually, is obligated to Fike. If that be the case, then it is clear that we are dealing with mutual, individual debts between McKee and Fike, and the right of set-off is present.

However, should the Referee's apparent conclusion that a joint venture was formed be allowed to stand, it makes no difference under Arizona law, since McKee would be liable for the Tucson House obligation to Fike both jointly and severally. Appellants have cited case law directly in point which clearly demonstrates that a debt owed jointly and severally may be offset with a debt which is owned individually. Thus, the right of set-off is available to McKee, since it is attempting to set off a separate debt which it owes severally against a separate debt which it owns individually, and appellants should prevail.

## ARGUMENT

### **1. McKee has a right to set-off the debt it owes in connection with Tucson House, with the debt it owns in connection with Lincoln Hospital.**

Section 68 of the Bankruptcy Act governs the right of set-offs in bankruptcy proceedings, and Sec. 68(a) reads as follows:

"In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set-off against the other, and the balance only shall be allowed or paid."

The above quoted section does not create any new right, but merely recognizes the existence of the doctrine of set-off, and provides a method whereby it can be enforced after bankruptcy.

The purpose of this section is to prevent a possible injustice which would result if a creditor were compelled to prove his claim in full and accept possible dividends thereon, and at the same time pay in full his indebtedness to the estate. It is clear, and both parties have so argued, that a set-off is not allowed when the two debts sought to be set off are not "mutual debts". The subject of mutuality will be taken up in detail in a later argument.

For the purpose of this argument appellants wish to state generally its reasons for claiming its right of set-off.

As the trustee has stated in an earlier brief (R. 148), "the crux and the determining factor of this review is whether or not McKee, in its individual capacity, has, as it maintains, a right of set-off." If the answer is in the affirmative, then appellants should prevail. If, on the other hand, the answer is in the negative, then the trustee should prevail.

The trustee has attempted to confuse this primary issue by bringing Tucson House Construction Company into the lawsuit (R. 40), and by stating that there were never mutual debts between Fike and Tucson House Construction Company (See Trustee's Legal Position No. 1, R. 47). The issue is not, as the trustee argues, whether Tucson House Construction Company was ever owed anything by Fike, but rather, whether McKee, either individually or as a co-adventurer, ever owed anything to Fike. Tucson House Construction Company is not the party attempting to effect a set-off in this case. McKee, either individually or as a co-adventurer in Tucson House, is the party attempting to effect a set-off. The real question to be decided in this appeal is whether McKee had a right to set-off the monies it owed, jointly and severally, to Fike on the Tucson House project in payment of Fike's obligation to McKee on the Lincoln Hospital project.

## **2. Fike became obligated to McKee as a result of its default on the Lincoln Hospital project.**

In order for appellants to prove their right of set-off, one of the things they must show is that Fike owed a debt to McKee.

Although the facts clearly establish that Fike became obligated to McKee as a result of its default on the Lincoln Hospital project, the Referee failed to specifically include this in his Findings of Fact or Conclusions of Law.

The Referee did, however, state in his Finding of Fact numbered 15 that the Lincoln Hospital project "did not go into default until after bankruptcy". Respondents' Exhibit No. 9 clearly shows that as of November 16, 1964, Fike was defaulted by McKee on its subcontract. It wasn't until the following day, November 17, 1964, that Fike filed its voluntary petition in bankruptcy.

If the above Finding is based upon Trustee's Exhibit 7, then the trustee and the Referee have completely ignored the law on this subject. The evidence is clear that McKee had knowledge that Fike was in fact in default on the Lincoln Hospital project prior to Fike's bankruptcy, and the law is clear that a default does not have to be formally declared. *Massachusetts Bonding and Insurance Company v. State of New York* (2d Cir. 1958) 259 F.2d 33.

By the terms of the contract dated May 31, 1963, between McKee and John C. Lincoln Hospital, Incorporated (Respondents' Exhibit 7), McKee became obligated to pay all claims arising out of the construction of this project, including unpaid materialmen's claims. In order to insure this, John C. Lincoln Hospital, Incorporated, required the execution of a bond (Respondents' Exhibit 7), by which McKee, as principal, and General Insurance Company of America, as surety, became jointly and severally liable for unpaid claims for labor and materials, including those claims arising out of materials furnished to Fike under its subcontract. By virtue of this bond, Fike's suppliers would be able to sue McKee directly, without having to join the bankrupt Fike.

Although the trustee has argued (R. 149) that no obligation existed on the part of McKee to pay Fike's suppliers on the Lincoln

Hospital project for the reason that there was no contractual relationship between McKee and these suppliers, the above two documents alone (Respondents' Exhibit 7) would be sufficient to demonstrate McKee's obligation to pay Fike's suppliers on the Lincoln Hospital project.

In addition, McKee entered into a subcontract with Fike (Respondents' Exhibit 8), wherein Fike agreed to protect, indemnify and hold McKee harmless from any and all liability, damages, claims, and expenses resulting directly or indirectly from the performance of the subcontract. The evidence is clear, therefore, that the \$50,745.12 which McKee has paid for labor and materials supplied to Fike in connection with the Lincoln Hospital project (Respondents' Exhibit 10), represented obligations for which McKee was directly liable, and for which Fike was liable over to McKee. The fact that McKee sought to protect itself by requiring Fike to obtain a bond (Trustee's Exhibit 5) in connection with the Lincoln Hospital project in no way diminishes the fact that an obligation existed on the part of McKee for the payment of Fike's suppliers.

There is an additional reason why the fact that Reliance Insurance Company is Fike's surety on the Lincoln Hospital project does not detract from the fact that McKee has an obligation on that job, and this relates to the laws of the State of Arizona. The trustee has attempted to confuse the subrogation rights of Reliance and the fact that Reliance was contractually responsible to Fike's suppliers on the Lincoln Hospital project with the obligations imposed upon McKee. Bonds are not one-way streets. Before the surety becomes obligated, it must first be shown that the obligee, in this case McKee (Trustee's Exhibit 5), has performed all of its obligations.

Arizona Revised Statutes Sec. 12-1641 reads as follows:

§ 12-1641. Action by creditor; failure to bring action and effect

"Any person bound as surety upon a contract for payment of money or performance of an act, when the right of action

has accrued, may require, by notice in writing, the creditor or obligee forthwith to bring an action upon the contract. If the creditor or obligee, not being under legal disability, fails to bring the action within sixty days after receiving the notice, and prosecute it to judgment and execution, the surety giving the notice shall be discharged from all liability thereon."

By the above statute, Arizona, along with 18 other states, has adopted the doctrine of *Pain v. Packard* (N.Y. 1816) 13 Johns 174,<sup>6</sup> which allows the surety to first require the obligee to seek his recovery from the principal. In this case Reliance requested McKee (T. II 35-36) to use the monies owed to Fike on the Tucson House project, by way of set-off, to pay Fike's bills on the Lincoln Hospital project.

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<sup>6</sup>There is an excellent discussion of the doctrine of *Pain v. Packard* in *Simpson on Suretyship* on pages 178-179 which reads as follows:

"The rule that mere quiescence by the creditor will not affect the surety's continued liability has been limited in three states by judicial decision, to the effect that a surety has the right to compel the creditor, by notice, to proceed against the principal debtor, at peril of discharging the surety to the extent that the latter can show damage by non-compliance. In the leading case applying this view, from which the doctrine derives its name, the defendant was known to be a surety and requested the creditor to sue the principal at maturity. It was held that his plea that the principal was solvent when the creditor was requested to sue, and could have been compelled to pay, but that he later became insolvent and absconded, so that the plaintiff could not obtain payment, stated a good defense. The court said. 'The fact of Packard having been security only, is fairly to be presumed to have been known to the plaintiff. He was, in law and in equity, therefore, bound to use due diligence against the principal, in order to exonerate the surety.' This view, however, appears to be indefensible, because one of the creditor's purposes in insisting upon the surety's undertaking is to avoid the burden and delay of enforced collection, and it has accordingly been rejected by a large majority of the courts. There is, of course, nothing in the *Pain v. Packard* doctrine which prevents the creditor from taking a judgment against the surety as well as the principal debtor. The surety is liable at maturity; the guarantor is liable immediately on default by the debtor. It is obviously unfair to require the creditor to stay his hand against a collateral promisor a moment after the time contemplated for payment by him, and there is no discernable reason for holding that the surety should not pay. Eighteen states have adopted the *Pain v. Packard* doctrine by statute. Under such statutes the creditor's failure to sue is sometimes held to discharge the surety, even though such failure causes him no loss."



Therefore Reliance never became obligated to "pay all unpaid charges", as contended by the trustee. The trustee's entire argument relating to Reliance's right of subrogation under Sec. 57(i) (R. 149) of the Bankruptcy Act is a complete smoke screen for the reason that Reliance's right of subrogation has not come into existence. Reliance did not make the payments in question to Fike's suppliers on the Lincoln Hospital project. McKee did, by effecting its right of set-off. Furthermore, Reliance is not a party to this lawsuit, and it is not attempting to effect the set-off in this case.

The trustee has argued that no inequity would result to appellants if the trustee is allowed to prevail, because of McKee's indemnity agreement from Reliance (Trustee's Exhibit 10). The fact that McKee has indemnification does not change the legal principles involved here. For if it does, then inequities are going to result to Reliance. Reliance had a legal right under A.R.S. Sec. 12-1641, which adopts the doctrine of *Pain v. Packard*, *supra*, to compel McKee to proceed against Fike by exercising its right of set-off. To the extent McKee failed to do this, Reliance would have been discharged and McKee would have suffered the loss. The fact that Reliance was willing to give McKee an indemnity against loss for effecting the set-off (T. II 35-37) should not take away the legal rights of both McKee and Reliance. Such a result would be in itself inequitable.

### **3. A joint venture or partnership was not formed in connection with Tucson House.**

In his Finding of Fact numbered 3 the Referee states that McKee, Robbins and Schiff "formed a joint venture". This statement is a conclusion of law which must be based upon facts. The Referee gave no findings of facts which would support such a conclusion. Likewise, in Finding of Fact numbered 5 the Referee states that "it is admitted, and the Court so finds that McKee was acting for and on behalf of the joint venture". McKee has never admitted that a joint venture existed, and its main contention

is that there is no partnership or joint venture involved under our fact situation.

Arizona Revised Statutes Sec. 29-206(A) defines a partnership as "an association of two or more persons to carry on as co-partners a business for profit." Therefore, the essential elements of a partnership are: (1) an association; (2) two or more persons; (3) to carry on a business; (4) the persons must be *co-owners* of the business; and (5) the purpose of the business must be for profit.

Thus, it can be seen that there must be an intention to carry on a business, and that the persons involved must be co-owners of the business. The Trustee has attempted to show that the "joint venture agreement" (Trustee's Exhibit 2) dated July 2, 1962 between Robert E. McKee General Contractor, Inc. and Bernard W. Robbins and Raymond S. Schiff, constituted a partnership limited to the single transaction of constructing Tucson House. While it is true that there are many Arizona cases which state that a joint venture differs from a partnership principally in that it is limited to a single transaction (see *Smith v. Phlegar* (1951) 73 Ariz. 11, 236 P.2d 749; *Ruby v. United States Co. S.A.* (1941) 56 Ariz. 535, 109 P.2d 845), the usual tests for determining the existence of a partnership or joint venture include: (1) a contract; (2) a common purpose; (3) community of interest (co-ownership) in the business conducted; (4) an equal right of control; and (5) an agreement to share profits and losses. *West v. Soto* (1959) 85 Ariz. 255, 336 P.2d 153.

It is McKee's contention that the intention of the parties, as set out in the "joint venture agreement" mentioned above, is spelled out to such a degree that there can be no question that a partnership was *not* formed. A review of the agreement will show that almost all of the elements (some of which are absolutely necessary to a partnership) are missing. Paragraph 1 of the "joint venture agreement" recites the fact that the parties have entered into this agreement for the sole purpose of entering into the

construction contract for the Tucson House project. This was a device whereby Robbins and Schiff obtained an identity of interest with the contractor while retaining their beneficial interest in the land, legal title to the land being held by Tucson Title Insurance Company, as Trustee. McKee never obtained any ownership interest in the project. McKee was, however, the general contractor on the Tucson House project, and, as shown in Paragraph 5 of the agreement, was in exclusive charge of every phase of the construction. Thus, there was no equal right of control.

In Paragraph 8 of the agreement, McKee agreed to indemnify Robbins and Schiff from any losses which they might suffer as a result of the "joint venture," including those arising as a result of the activities of any subcontractor (T. I 57-64). Thus, no sharing of losses was intended, and all such losses were McKee's.

Although the agreement was labeled a "Joint Venture Agreement", in reality it was not a joint venture in the partnership sense, but an arrangement for the purpose of helping out the owners (Robbins and Schiff) in obtaining financing of the project (T. I 54-57). The three parties to the agreement were not partners for the reason that their venture was not a business under the better rule that a business, as such, contemplates the doing of a series of acts toward a specific end, not the mere performance of a single transaction or type of activity. The usual distinction between a partnership and a joint venture is this — each partner is a general agent of his partners, but each joint adventurer is not an agent of his co-joint adventurers. *Nolan v. J. & M. Doyle Co.* (1940) 338 Pa. 398, 13 A.2d 59. In Paragraph 1 of the agreement, the parties specifically stated that "the joint venture shall not constitute a general partnership between the parties and shall not authorize any party to act as the agent of any other party except as specifically authorized herein." It is clear that the intention of the parties throughout the agreement was to enter into a contract and not a business. Even if it could be contended that the joint venture arrangement amounted to

a business, the essential element of co-ownership, which would make the arrangement a partnership, is lacking.

The recitals in the agreement clearly state that Robbins and Schiff own all the beneficial interest in the land, and nowhere does the agreement state that McKee had or obtained any ownership interest in the project, and in fact, it had none. Therefore, the vital element of a community of interest or co-ownership is lacking. That this element is necessary has been spelled out in a number of cases including *West v. Soto*, supra.

The fact that Paragraph 9 of the agreement states that McKee shall receive payments as its share in the joint venture does not constitute a prima facie case of partnership since, as stated in Arizona Revised Statutes Sec. 29-207,<sup>7</sup> "no such inference shall be drawn if such profits were received in payment: (a) As a debt by installments or otherwise". The "sharing" in this case was merely a convenient method for the beneficial owners to pay their

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<sup>7</sup> A.R.S. Sec. 29-207 reads as follows:

§29-207. Rules for determining the existence of a partnership

"In determining whether a partnership exists, these rules shall apply:

1. Except as provided by § 29-216 persons who are not partners as to each other are **not partners as to third persons.**

2. Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits **made by the use of the property.**

3. The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

4. The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise.

(b) As wages of an employee or rent to a landlord.

(c) As an annuity to a widow or representative of a deceased partner.

(d) As interest on a loan, though the amount of payment vary with the **profits of the business.**

(e) As the consideration for the sale of a good will of a business or **other property by installments or otherwise."**

debt or the costs of construction to McKee, and McKee received such proceeds as part payment of such debt, as shown in Paragraph 9(a) of the agreement. This clear showing of the intent of the parties overcomes any prima facie case of partnership made out by the "sharing". There was, therefore, no agreement to share profits as such, because what McKee was to receive was guaranteed and determined in advance, and *there can be no partnership without an agreement to share the profits. Estrella v. Suarez* (1943) 60 Ariz. 187, 134 P.2d 167.

In short, it does not appear that there was ever an intention on the part of McKee on the one hand and Robbins and Schiff on the other to become partners. The general rule is that persons who are not partners as to each other cannot be partners as to third persons. Since the "joint venture agreement" does not provide: (1) for a share of profits or losses; (2) for equal right of control; or (3) for a community of interest, it cannot be seriously contended that it was the intention of the parties that a partnership be formed.

This point is further emphasized in the Referee's Finding of Fact numbered 14, that the "joint venture" transferred the sum of \$50,745.12 to McKee on February 19, 1965 (Trustee's Exhibit 15)<sup>8</sup> long after the bankruptcy trustee made a demand upon the "joint venture" for the funds and instructed it not to disburse the retention proceeds. There is no evidence in the record to support this finding. The demand letters the Referee is apparently talking about are Trustee's Exhibit 9, written January 22, 1965, and Trustee's Exhibit 16, written February 11, 1965, by the attorney for the trustee, both letters being directed to *Robert E. McKee General Contractor, Inc.* Even the trustee recognized that the contractor on the Tucson House project was McKee, and that the obvious person to send such demand letters to would be McKee.

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<sup>8</sup>Note that the checks effecting the set-off or transfer are dated February 15, 1965.



**4. The two debts sought to be set off are mutual debts for the reason that McKee owes its Tucson House debt to Fike, whether such debt be considered as an individual debt or one which is owed jointly and severally.**

Section 68 of the Bankruptcy Act allows set-offs against a bankrupt by one of its debtors on the condition that the debts are mutual. It has been said that in order for mutuality to exist, each party must own his claim in his own right severally, and the right to collect it in his own name against the debtor, in his own right and severally.<sup>9</sup> The trustee's major contention, and the conclusion reached by the Referee, is that the debts are not "mutual" within the purview of the Bankruptcy Act. This conclusion is erroneous. The only way that the Referee could have reached this conclusion was on the basis of certain cases presented by the trustee which have no applicability to the facts of this case.

The trustee basically relied on a quotation in Collier on Bankruptcy that a joint debt cannot be set-off against a separate debt, and vice-versa.<sup>10</sup> The authority for this statement is a New York case, *In re Shults* (D.C.N.Y. 1904) 132 F. 573.

The *Shults* case involved a transfer situation in which certain depositors assigned their claims against the bank, which was in reality a bank partnership subsequently adjudicated a bankrupt, to a firm of which one of the depositors was a member, and which was a debtor of the bank, for the purpose of enabling such claims to be used as a set-off against the indebtedness. This was clearly a preference situation, having no resemblance to the facts of our case.

The Court, in the *Shults* case, stated "*The rule in the State of New York seems to be that a joint debt cannot be set off or operate as a counterclaim against a separate debt, or, conversely, a separate debt against a joint debt.*" Because of this rule, the Court held in the *Shults* case that a solvent partnership which is indebted to a

<sup>9</sup>4 Collier, *Bankruptcy*, 14th ed., ¶ 68.04, pp 735-736.

<sup>10</sup>4 Collier, *Bankruptcy*, 14th ed., ¶ 68.04, p 736.

bankrupt cannot set off against such indebtedness a claim due from the bankrupt estate to one of the partners. The State of New York follows the common law rule that contractual obligations of partners are joint only, and not joint and several. Thus the holding in the *Shults* case is that joint debts and several debts are not mutual, and can not be set-off one against the other. The rule in Arizona differs from the common law rule, however, and therefore the rule in *In re Shults* does not apply to this case.

Airzona has by statute made partners' contractual obligations both joint and several. Such a result is clearly intended by omitting the word "jointly" in §29-215 Arizona Revised Statutes, which reads "All partners are liable jointly and severally for everything chargeable to the partnership under §§29-213 and 29-214, and [jointly omitted here] for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract."<sup>11</sup>

Therefore, if, as the trustee argues, McKee entered into a partnership agreement with the beneficial owners, then, by virtue of the above statute, McKee remains severally liable for any debt owed the bankrupt, and the requisite mutuality is present. McKee contends that its right to set-off its Tucson House debt against Fike's obligation arising out of the Lincoln Hospital project is valid and bona-fide. This is not a case of a joint debt trying to be set-off against a separate debt, or vice versa, but of a *separate debt* being *set-off against a separate debt*. Mutuality exists, since each party owns his claim in his own right, severally, with the right to collect it in his own name against the debtor, in his own right and severally. The test of mutuality, therefore, is: Can Fike, under Arizona law, sue McKee individually to collect the monies alleged to be due from the Tucson House project? Since McKee's liability on that project is *several* as well as joint under the Arizona Partnership Act, the answer is yes, and therefore mutuality exists.

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<sup>11</sup>See Commissioners Notes, Uniform Partnership Act, 7 Uniform Laws Annotated, Sec. 15.

There are many cases which support McKee's contentions, including annotations in 5 *A.L.R.* 1541 and 55 *A.L.R.* 566, regarding the right to set-off a claim of an individual partner against a claim against the partnership, where the partnership liability is joint and several. In *Columbia Taxicab Co. v. Mercurio* (1921) 208 Mo.App. 492, 236 S.W. 1096, it appeared that a partnership was sued for damages resulting to the plaintiff by reason of a collision between the plaintiff's automobile and a truck owned by the partnership and operated by one of the partners. The Court held that, a partnership debt being joint and several, each member may be sued separately and made to pay the whole of it, and therefore it follows that the separate demands of each member of a partnership may be set-off against their joint (and several) obligation.

In *Boeger & Buchanan v. Hagen* (1927) 204 Ia. 435, 215 N.W. 597, it was held that in an action by a receiver of an insolvent bank on a partnership note, the personal deposit account of one of the partners may be allowed properly as a set-off against the bank's claim against the firm on the partnership note, in view of a statute which makes each member of a partnership primarily liable for the partnership debts. The Court followed the rule suggested by Justice Holmes in a United States Supreme Court case (*Francis v. McNeal* (1913) 228 U.S. 695, 33 S.Ct. 701, 57 L.Ed. 1029) that a partnership debt is in reality the individual debt of each of the individual members of the partnership, and their liability thereon is a primary liability and not a secondary one.

Another case in point is *Bryant Bros. v. Wilson* (1934) 253 Ky. 578, 69 S.W.2d 1020. In that case the lower court had prevented one partner from relying upon his individual claim against the plaintiff as a set-off against the latter's action against the partnership for the reason that the necessary mutuality was wanting. The lower court stated that at that date the individual partner was only jointly liable with his other partners for the partnership

obligation, and was not separately and individually liable to the owner of the obligation for the entire debt. The Supreme Court of Kentucky reversed the lower court and allowed the set-off, saying: "Statutes in this and other states have eliminated that basis for that theory, since a joint contractor is severally and individually liable for the entire joint obligation. Hence it is now the law in this state, and in practically, if not in all of the others, that one of two or more joint obligors may set off plaintiff's joint obligation by the amount of an individual claim due him or them from plaintiff."

The trustee's attorney, during the course of oral argument, responded to McKee's joint and several liability theory by saying, "Mr. Haug gave you umpteen cases on offset . . . there isn't a single bankruptcy case in there, nothing with bankruptcy, just a lot of general stuff, . . ." (T. II 55). The trustee's attorney then cited the one case he found involving a bankruptcy situation, *Poncet Davis Co. v. Roberts* (5th Cir. 1943) 138 F.2d 538, in which there is no discussion by the Court on the question of mutuality. The Court denied the set-off in that case because it was being asserted in a consolidated claim, and the law did not authorize the filing of such a claim. (T. II 43-45). It should also be pointed out that the person attempting the set-off in that case was the alter ego of the *bankrupt* corporation, and the facts are so blatantly dissimilar that under no circumstances could it be considered as controlling in our case.

The trustee argues that "a partnership debt is first and foremost the responsibility of the partnership" (R. 150). The trustee then presents the case of *Springer v. Bank of Douglas* (1957) 82 Ariz. 329, 313 P.2d 399 for the proposition that "the liability of a co-partner becomes his several obligation only when the partnership property is inadequate to pay the partnership debts, or when there is no effective remedy without resort to his individual property."

The basic facts of the *Springer* case were that one co-partner

executed a promissory note on behalf of the partnership. The Court held that if such note was secured by a mortgage on partnership assets, then the maker would be entitled to have the assets covered thereby applied toward the satisfaction of the partnership debt, before enforcing the judgment against the partner personally. There is no evidence in our case which suggests the possibility of a mortgage existing on the "joint venture" assets, and the limited holding of the *Springer* case does not apply to our fact situation. Under no stretch of the imagination could the *Springer* case be interpreted as denying McKee its right of set-off under our fact situation, even if we take the trustee's case at its best and assume that a "joint venture" had been formed. For in that case McKee's liability would be joint and several, and the assets of the "joint venture" would not have to be first exhausted before McKee would be responsible severally.

Appellants urge that the Court consider the case of *In re Sherman Plastering Co.* (2d Cir. 1965) 346 F.2d 492, which decision should lay to rest trustee's argument that a joint and several debt can not be set-off against a separate debt, and vice-versa. The *Sherman* case involves the Bankruptcy Act and holds that joint and several debts (e.g. Arizona partnership debts) are mutual to several debts.

In the *Sherman* case the court held that a surety's successor (Hanover), which was under a joint and several obligation to a debtor-in-possession (Sherman) on a claim on a performance bond, could set-off a several claim against the debtor-in-possession arising out of a prior transaction in which it was surety for the debtor-in-possession.

On March 15, 1963, Sherman Plastering Corp. (Sherman) filed a petition for a Chapter XI arrangement, and was thereafter permitted to operate its business as a debtor-in-possession. Several years prior to filing its petition, Sherman was engaged as a subcontractor by Joseph Rugo, a prime contractor, in the construction of an office building for the State of Maine. Sherman had



faithfully performed its duties and, when Rugo defaulted in payment, Sherman turned to the bond furnished by Rugo. This bond was executed in 1956 by three corporate sureties, Massachusetts Bonding & Insurance Co. (Mass. Bonding), United States Fidelity & Guaranty Co. (Fidelity), and American Automobile Insurance Co. (American). The bond bound the sureties "jointly and severally" as well as 'severally'; and it obliged Mass. Bonding to pay 50 per cent of the penal amount and the other two sureties to pay 25 per cent each. In 1957 Sherman commenced an action on the bond in the name of the State Treasurer; and on February 24, 1964, a judgment of \$39,943.15 plus interest was entered in its favor, which was affirmed on appeal on January 11, 1965 save for the method of computing the interest. The court then stated:

"The sureties were explicitly held jointly liable (a point much stressed by appellant although we can perceive no difference here relevant between a joint and several liability). Sherman could collect up to the whole judgment from any one or more of the obligors; and to the extent that this exceeded any obligor's pro rata share, that obligor would have to seek reimbursement from the others. 4 Corbin, Contracts, § 928 (1951)." (346 F.2d at p. 493).

The sureties consented to the jurisdiction of the bankruptcy court and sought to satisfy their obligations arising from the Maine judgment. Fidelity and American tendered to the bankrupt-Sherman their pro rata shares of the judgment, and Hanover Insurance Co. (Hanover), which had succeeded to Mass. Bonding's rights during the pendency of the Maine action, sought to discharge its pro rata share by offsetting it against an unrelated indemnification claim owed from the debtor when it filed its proof of that claim on February 24, 1964. This claim arose from Sherman's contractual duty to reimburse Hanover for payments made under another performance bond issued in 1960, by which Hanover acted as surety for Sherman in another construction job.

In the words of the court,

"Sherman resisted, and refused the tenders for obvious rea-

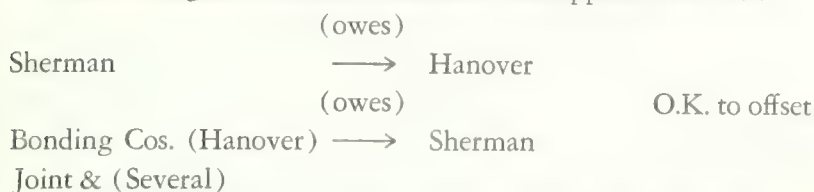
sons. Its strategy was to collect the full amount of the Maine judgment from American and Fidelity, with the hope of destroying Hanover's set-off, thereby enabling it to pay off Hanover's claim at the scaled down rate fixed in the Chapter XI arrangement and yet to satisfy its claim under the Maine judgment in full. It sought to justify this position by invoking the maxim that a joint debt (the debt owed by Hanover) cannot be set off by a single debt (the debt owned by Hanover), and by insisting that this maxim was embodied in the mutuality-of-debts requirement of section 68 of Bankruptcy Act." (346 F.2d at p. 493).

The Referee in Bankruptcy initially enjoined Sherman from executing and enforcing the Maine judgment; but he vacated this injunction after reaching the merits of Hanover's petition and deciding to disallow the set-off for want of the requisite mutuality. On a petition for review, however, the District Court reversed the Referee and allowed the set-off.

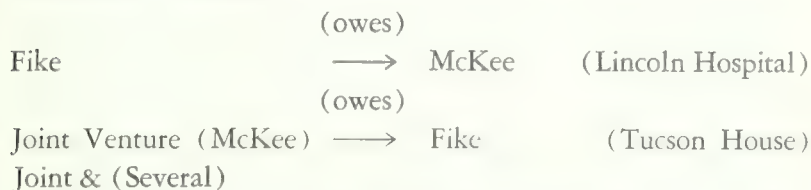
The Circuit Court affirmed the District Court's order modifying the Referee's disposition by saying:

"No legitimate interest would be served by disallowing this set-off, and in fact disallowing the set-off would frustrate the manifest equitable purposes of section 68. It would put Hanover in the inequitable position of having to pay its debt to Sherman in full while receiving only partial satisfaction of its claim against Sherman. Neither the rehabilitative purposes of a Chapter XI arrangement nor section 68's requirement that the debts be mutual dictates such a result. The debts are owed and owned by the same party, acting in the same capacity. The jointness of the debt owed by Hanover affords Sherman the alternative of collecting the whole amount from the other joint obligors. However, the availability of this alternative, conceived of as a means of protecting the obligee from certain contingencies, none of which materialized in this case, such as the insolvency or lack of amenability to suit of the other joint obligors, does not mean that Hanover does not owe its agreed upon share of the joint debt, or that it owes it in a different capacity than it owns its debt against Sherman. There was equity in preventing Sherman from pursuing the course it sought to follow." (346 F.2d at pp. 493-494).

Thus in diagram form the *Sherman* case appears like this:



A diagram of our case would look like this if a joint venture was actually formed:



The similarity between the cases is immediately apparent, and it should be noted in both these instances that the debt is *owned* by the non-bankrupt *individual*, and *owed* jointly and *severally* by the party effecting the set-off.

The Court in the *Sherman* case went on to say:

"There is . . . no inequity in allowing the set-off in the instant case. Neither Hanover's joint obligors nor its creditors could be prejudiced by the set-off. Nor would the joint obligors be receiving an unfair benefit, for if the set-off is allowed they would be paying no less than their pro rata share of the joint liability; and there is nothing unfair about saving them the expense, or foregoing the risk that would be involved in seeking reimbursement from Hanover if they were obliged to pay more than their pro rata share of the joint liability. Moreover, Sherman would have the 'reciprocal right to do the same thing,' that is, if Hanover rather than Sherman were bankrupt Sherman could apply Hanover's pro rata share of liability under the Maine judgment to discharge its obligation to Hanover." (346 F.2d at pp. 494-495).

In our case McKee has fully indemnified Robbins and Schiff, and thus our joint obligors likewise would not be receiving an unfair benefit if the set-off is allowed.

No legitimate interest would be served in disallowing this

set-off, and, in fact, disallowing the set-off would violate the obvious equitable purposes of Sections 68 of the Bankruptcy Act. It would put McKee in the inequitable position of eventually having to pay its debt to Fike in full, while receiving only a partial satisfaction of its claim against Fike.

The Court in the *Sherman* case, in affirming the District Court order reversing the Referee in Bankruptcy, concluded as follows:

"The venerable maxim that a joint debt cannot be set off against a separate debt, and vice versa, see 3 Story, Equity Jurisprudence, §1874 (14th ed. 1918), like all maxims tested by experience, has its exceptions, and this is one of them." (346 F.2d at pp. 496-497).

**5. The proceeds obtained by McKee in connection with Tucson House were not wrongfully obtained, nor were they "trust proceeds".**

The trustee first advanced his "trust theory" argument to demonstrate the summary jurisdiction of the Bankruptcy Court. The Referee in Conclusion of Law numbered 1 (a) decided that he had jurisdiction because the Tucson House debt was a "trust fund," and because at the date of bankruptcy the "fund" was in the constructive possession of the Court. The Referee overlooked the fact that Fike's contract was with appellants, who had no obligation to pay Fike out of the monies it received from the "Owner". Appellants could choose any fund out of which to pay Fike's retention money (T. 1104), and for this reason alone there was never a trust in favor of Fike on any particular fund of money.

Moreover, Fike's right to be paid was not absolute, but only conditional on its proper performance, not only of the Tucson House contract, but also any contracts which it might have had with appellants. The trustee can stand in no better position with respect to this obligation than Fike. This makes even better logic when we conceive of Fike's property interest in the "fund", assuming such a "fund" ever existed, as a bundle of rights in the Hohfeldian sense. All Fike is able to give to the trustee is a few strings to the "fund", not the "fund" itself. These strings were

cut when Fike failed to perform all the obligations it owed to appellants, and the trustee's right to the "fund" ceased to exist.

The only possible way Fike might have obtained an interest in the "fund" while it was in the hands of the "Owner" was by perfecting a valid Notice and Claim of Lien under the Arizona statutes. Under such circumstances the owner is given the right to withhold payment from the contractor, and, under certain conditions, is given the right to pay to the subcontractor the amount of his lien. We believe this was the basis for the Referee's holding in his Conclusion of Law numbered 1 (b). This point will be discussed in the following argument.

The trustee further relied on his "trust theory" for the proposition that McKee was not entitled to a set-off. Appellants agree with the trustee that where the liability of the one claiming a set-off arises from a fiduciary duty or is in the nature of a trust, the requisite mutuality of debts does not exist, and such person may not set-off a debt owing from the bankrupt against such liability. However, never was it shown by the trustee that McKee owed any fiduciary duty to Fike or that a trust existed.

The only trust involved in our fact situation is the trust under which Tucson Title Insurance Company held legal title to the property in question, as Trustee. The joint venture agreement (Trustee's Exhibit 2) or contract arrangement between McKee, as contractor, and Robbins and Schiff, as beneficial owners of the property, provides, as previously pointed out, that McKee shall be in charge of the construction, make all subcontracts, *collect all monies* that may accrue under the construction contract and be responsible for the work to the end of final completion. In addition, McKee is responsible for all monies paid out, as defined under Paragraph 10 of the agreement under the term "actual costs of construction". There is nothing in the agreement which provides for Robbins and Schiff to collect any monies.

Therefore, it cannot be logically contended that the proceeds the trustee is seeking were obtained by McKee "illegally". McKee,



by virtue of its agreement with the beneficial owners, was responsible to collect the monies and make all payments, including the 10% retention proceeds due Fike upon completion and acceptance of Fike's work by the owners. McKee, therefore, obtained these proceeds legally and in accordance with its contract with the beneficial owners.

**6. The lien urged by the trustee is completely invalid for the reason that a copy of the Notice and Claim of Lien was never served upon the owner as required by the laws of the State of Arizona.**

In Finding of Fact numbered 11, a statement is made that the owner was not prejudiced by the failure of Fike to serve a copy of the Notice and Claim of Lien upon the owner. Whether there was or was not prejudice is wholly immaterial to this case. The statement, which is a conclusion of law, was made for the purpose of attempting to establish the trustee's so called "trust theory", which has been previously discussed.

Appellants have always maintained that the trustee's claimed lien was invalid. The laws of the State of Arizona<sup>12</sup> require that

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<sup>12</sup> A.R.S. Sec. 53-993 which reads as follows:

§ 53-993. Procedure to perfect lien; notice and claim of lien; service; filing

"In order to impress and secure the lien provided for in this article, every original contractor, within ninety days, and every other person claiming the benefits of this article, within sixty days after the completion of a building, structure or improvement, or any alteration or repair thereof, shall make duplicate copies of a notice and claim of lien and file one copy with the county recorder of the county in which the property or some part thereof is located, and within a reasonable time thereafter serve the remaining copy upon the owner of the building, structure or improvement, if he can be found within the county. The notice and claim of lien shall be made under oath by the claimant or some one with knowledge of the facts, and shall contain:

1. A description of the lands and improvements to be charged with a lien, sufficient for identification.

2. The name of the owner or reputed owner of the property concerned, if known, and the name of the person by whom the lienor was employed or to whom he furnished materials.

(Footnote continued)

a copy of the Notice and Claim of Lien be served upon the owner within a reasonable time after the instrument is filed. The trustee has admitted (T.I 123) that no copy of the Notice and Claim of Lien was ever served upon Tucson Title or McKee. The trustee likewise has never proved that a copy was served on either Robbins or Schiff, the beneficial owners.

A.R.S. Sec. 33-994 provides that the owner, upon being *served* with a Notice and Claim of Lien, *may* retain, out of the amount due or to become due the original contractor, the value of the labor and material shown by the lien. The owner is then required to furnish the contractor with a copy of the lien, and if the contractor does not object to the lien within 10 days, the owner can pay the lien claimant. The purpose of this statute is to protect the owner against the delinquencies of the contractor, and is not mandatory, but merely permissive on the part of the owner. Perhaps if Fike had followed this procedure and perfected a valid lien, there might have been merit to the trustee's argument. The facts, however, do not support the trustee. While it is true that Fike filed the lien, the Referee found as a fact that the lien was not served upon the "Owner".<sup>13</sup>

The lien must be both filed and served if there is to be substantial compliance with the lien law and a validly perfected lien. *Leeson v. Bartol* (1940) 55 Ariz. 160, 99 P.2d 485. Since the lien was not valid, there was never a trust in favor of Fike on any particular fund of money, and there is absolutely no evidence in the record which will support a "trust theory" arising out of Fike's filing a lien. For the Referee to reach the conclusion that the appellants didn't have a legal right, because of the lien, to

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(Footnote continued)

3. A statement of the terms, time given and conditions of the contract, if it is oral, or a copy of the contract, if written.

4. A statement of lienor's demand, after deducting just credits and offsets."

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<sup>13</sup>See Referee's Finding of Fact numbered 11.

receive from the "Owner"<sup>11</sup> the money that the "Owner" was obligated by contract to pay the appellants, is completely erroneous.

The Trustee has presented the case of *Green v. H. E. Butt Foundation* (5th Cir. 1954) 217 F.2d 553, for the proposition "that once a lien claimant files a claim of lien, that the amounts claimed by virtue of that lien become impressed with a trust" (T.H 13-14). The *Green* case obviously deals with a situation where the lien has been properly perfected, while the trustee in our case has never even argued that Fike's lien was properly perfected. In *Leeson v. Bartol, supra*, the lien claim was served within a reasonable time as provided by the statute; but that case pointed out that there must be substantial compliance with the lien law, and certainly does not stand for the proposition that failing to serve a copy of the lien claim on the owner allows for a finding of substantial compliance.

**7. McKee had a legal right to retain the retention proceeds on Tucson House for the life of Fike's warranty.**

On August 6, 1962, Fike and appellants entered into a sub-contract (Trustee's Exhibit 3), in which Fike agreed to furnish labor and materials for the Tucson House project. In Paragraph 27 of this contract Fike agreed to guarantee all work performed in the course of the Tucson House project against defective materials and/or workmanship for a period of one year from the date of acceptance by the owner of the *completed* contract. In Paragraph 19 of this contract Fike further agreed that the contract could be canceled at appellants' option if Fike failed to properly perform any term, covenant, or condition of the contract,

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<sup>11</sup> The trustee has had difficulty in distinguishing between the legal owner of Tucson House, Tucson Title Insurance Company as Trustee, and the beneficial owners, Robbins and Schiff. Since neither the legal nor beneficial owners were served with a copy of Fike's Notice and Claim of Lien, appellants contend that McKee was rightfully entitled to final payment, whether it be considered to come from the beneficial owners or through the medium of the trustee as legal owner.

and that all losses should be deducted from the contract price therein stated.

Thus, by the very terms of the subcontract, McKee had the right to retain the retention proceeds in the exercise of its option to cancel the contract, and it could therefore deduct any losses or expenses incurred by Fike's breach of the contract, and also exercise any legitimate right of set-off to which it was entitled.

In addition, appellants claim that the act of bankruptcy was an immediate anticipatory breach of contract (T.II 50-52), as has been held by the Supreme Court of the United States, and it was therefore not necessary for appellants to tender the retention proceeds to the bankrupt. *Central Trust Co. v. Chicago Auditorium Asso.* (1916) 240 U.S. 581, 36 S.Ct. 412, 60 L.ed. 811; *In re Robertson* (D.C. Ark. 1941) 41 F.Supp. 665, 668; *United States v. Brunner* (10th Cir. 1960) 282 F.2d 535, 538; *In re Hot Springs Broadcasting Co.* (D.C. Ark. 1962) 210 F.Supp. 533, 542. Appellants agree that if Fike had not gone into bankruptcy and had been able to perform its warranty obligations, or if the trustee had agreed to assume these obligations within a reasonable time,<sup>15</sup> which he never did, then appellants might have been obligated to turn money over to Fike had no right of set-off existed.

In our situation, however, Fike placed itself beyond the position of being able to perform its warranty obligations, and therefore no trust could have been placed on the retention funds which would have required appellants to turn the money over to the trustee.

The trustee has argued that Fike had earned the retention proceeds here in issue long before its bankruptcy (R. 63). Appellants disagree with this argument. Webster's Dictionary defines "earn" as "to become entitled to", and certainly it cannot be successfully argued that Fike was entitled to the retention

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<sup>15</sup> Bankruptcy Act, Sec. 70(b)

proceeds, in view of its warranty obligations and McKee's right of set-off. For the trustee to argue that Fike's ultimate bankruptcy was not a breach of the subcontract, insofar as Fike's right to the retention proceeds was concerned, is contrary to the law. Since Fike was unable to perform its warranty obligations, and the trustee unwilling to assume them, appellants never became obligated to turn over the retention proceeds until the warranty period expired, notwithstanding McKee's right to set-off the majority of the retention monies.

In Finding of Fact numbered 16 it is stated that the "joint venture" never made a demand upon the trustee to perform the warranty portion of Fike's subcontract on the Tucson House project. This statement of fact is completely misleading for it assumes that there is a duty incumbent upon a contractor to demand that the trustee perform an executory contract. Clearly, under section 70(b) of the Bankruptcy Act the trustee has 60 days within which to assume or reject any executory contract, and any such contract not assumed or rejected within 60 days after the bankrupt's adjudication, whether or not a trustee has been appointed or has qualified, shall be deemed to have been rejected. There is no evidence that the trustee ever agreed to assume responsibility for the warranty obligations mentioned above.

Also, in his Finding of Fact numbered 16, the Referee provides us with a "literal" interpretation of the subcontract in regard to the bankrupt's warranty period. The evidence clearly demonstrates that the date of acceptance by the owner of the completed contract (which includes final payment by the owners) was December 11, 1964 (T. I. 12, 35; Trustee's Exhibit 3). Therefore the one-year warranty period would not begin until that date, and the Referee's finding in this regard, which apparently implies that the FHA might have been the "Owner", is not supported by the evidence.

#### **8. There was no wrongful transfer of McKee's right of set-off.**

The trustee has argued that the proceeds here in issue were



obtained by McKee after the bankruptcy, and therefore "the claimed set-off falls clearly within the prohibition of Sec. 68(b) of the act" (R. 48). In view of the provisions of Sec. 68(b), it appears that the trustee is contending that a right of set-off was transferred to McKee after the filing of the bankruptcy petition.

It is clear from the record that any debt owed Fike by appellants was owed both before and after the bankruptcy (even if not yet due), and was owed jointly and severally, or individually by McKee. McKee also owned its debt from Fike on the Lincoln Hospital project both before and after the bankruptcy, and still owns it. There has been no attempt to transfer to McKee a right of set-off after the filing of the petition, as claimed by the trustee, since McKee itself had a set-off or the right to assert same at the time of the bankruptcy by virtue of both owning and owing a debt involving the same party, Fike. Therefore, the prohibition contained in section 68(b) of the Bankruptcy Act does not apply.

The record demonstrates that there is nothing wrongful in the owners making final payment to McKee acting under the name of the "joint venture", and in the subsequent placing of the money in the Tucson House Construction Company bank account. McKee subsequently withdrew the money involved from one bank account and switched it into another to mechanically accomplish the set-off (T.I 29, 35-39, 43-44). For the trustee to thus argue (T.II 26-27) that McKee was a converter of funds is ridiculous. There is no valid reason why McKee, assuming it has a valid right of set-off, at any point in time could not choose to transfer a certain amount of money to itself from the Tucson House Construction Company account to set-off certain legal obligations owed to it by Fike in connection with the Lincoln Hospital project.

If McKee is not entitled to the set-off, then obviously it should add the \$50,745.12 by some accounting procedure back to the amount owed Fike under the Tucson House subcontract. But to argue that by thus effecting the set-off that McKee has obtained

proceeds after the act of bankruptcy, and therefore is not entitled to a set-off is to argue in circles. By hypothesis, if McKee is entitled to the set-off, then its mechanical transfer of funds does not amount to obtaining proceeds after bankruptcy, and therefore the provisions of section 68(b) would not be applicable.

**9. Reliance Insurance Company's interest does not detract from the validity of McKee's right of set-off.**

From the very beginning of these proceedings the trustee has attempted to inject the ugly spectre of Reliance Insurance Company as the "real party in interest", and has tried to picture McKee as an unwilling "front" or "conduit" for Reliance (R. 62). McKee's version of the indemnity agreement (Trustee's Exhibit 10) has been reiterated before (Argument III; see also T. II 35-36), and it has been admitted by the trustee that the crucial issue in this lawsuit is whether or not McKee, (not Reliance), has a right of set-off.

Although it is indicated in Findings of Facts numbered 18 and 19 that the real party in interest herein is Reliance Insurance Co., no foundation is given for arriving at such a conclusion. Conclusion of Law numbered 1(d) similarly states that Reliance Insurance Co., which is not a party to these proceedings, is the "real party in interest." The words "real party in interest" are words of legal art and refer to the person who is denominated as the plaintiff, claimant or petitioner. If Reliance Insurance Co. is in fact the real party in interest, then why wasn't it made a party to these proceedings?

The fact that Reliance Insurance Co. has something to gain by the allowance of the set-off has no proper materiality to the outcome of this lawsuit. For that matter, all of Fike's creditors have something to gain if McKee is made to pay Fike's claim in full, while receiving only a partial return on its claim. The only purpose for the above Conclusion is a "bootstrap" attempt by the Referee to obtain summary jurisdiction (T. II 22-25), based on the fact that Reliance has filed a claim in these proceedings; and

this purpose has subsequently been rendered moot since appellants have consented to summary jurisdiction.

Appellants are not proceeding under a subrogation theory as the trustee would have the Court believe (R. 1-49; see also Argument II). Appellants deplore the trustee's continued attempts to create sympathy for his cause by labeling Reliance as the bogeyman in these proceedings, and by attempting to point out that Reliance will secure some imagined benefit for its vile scheme. The important and only material issue to consider is that *McKee has a bona fide right of set-off to which it is entitled*, and this is true irrespective of the bonding companies involved.

**10. McKee has suffered additional warranty expenses on Tucson House.**

The Referee found that McKee had incurred expenses in the amount of \$2,765.45 in payment of Fike's unpaid materialmen's claims in connection with the Tucson House project. In addition, the Referee found that McKee had expended a total of \$1,375.87, exclusive of the lien bond premium (Respondents' Exhibit 10), in performing Fike's warranty obligations up to September 20, 1965, the date of the hearing before the Referee.

Since the above date, and prior to the expiration of the one year warranty period (T. I 78), calculated by appellants to be December 11, 1965, other charges have been made against Fike's account for warranty obligations, which amounts have heretofore not been presented to the Court. These additional sums amount to \$1,517.92, for which McKee has proper invoices and substantiating documents. At the present time McKee calculates it has on hand some \$2,515.59 credited to Fike's account on the Tucson House project, which sum McKee stands willing to turn over to the trustee when properly ordered to do so.

**11. No interest should be allowed the trustee prior to December 11, 1965.**

The Referee's order allows the trustee interest, on the sum

ordered to be turned over, to run from January 11, 1965. This date is in error since appellants have demonstrated, and the Referee has apparently conceded in his Finding of Fact numbered 17, that McKee had the right to retain the retention proceeds for the life of the warranty of one year, or until December 11, 1965. Clearly no interest can be charged to appellants for any period prior to December 11, 1965, which is the earliest date McKee could have, with National Surety's consent, turned over any money.

The trustee's argument (T. II 11; R. 65), apparently adopted by the Referee and the District Court, begins with the fact that the subcontract on Tucson House provided that the one-year warranty commenced on "the date of acceptance by the Owner of the completed contract." The trustee argues that since the evidence shows that acceptance took place in February, 1964 when the Owner<sup>16</sup> took occupancy of the premises (Footnote 17 in R. 65), and certainly by July, 1964 when the FHA accepted the project as 100 percent complete, that therefore the one-year warranty commenced in February, 1964.

Neither the trustee nor the Referee has ever explained why the date of January 11, 1965 was chosen as the date upon which Tucson House Construction Co. must begin paying interest. It is also obvious that the trustee has ignored that part of the subcontract provision quoted above which speaks of the warranty commencing after the *completed contract*. The contract was not completed until final payment was received from the owners on December 11, 1964, and therefore no interest could reasonably be charged appellants prior to December 11, 1965. Of course, if appellants are correct in their contention that McKee has a bona fide right of set-off, then no interest would be legally chargeable to appellants, and this question would become moot.

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<sup>16</sup> Now it appears that the trustee is talking about the beneficial owners, Robbins and Schiff.

**12. The trustee is not entitled to an attorney's fee in this matter.**

The Referee has ordered, and the District Court has concurred, that a reasonable attorney's fee in this case be set, for services rendered to date, at \$5,500. There is absolutely no evidence in the record to support such a finding, as at no time did the attorney for the trustee attempt to present any evidence bearing on the question of attorney's fees. In fact, the record shows that the trustee's attorney rested without putting on any evidence of attorney's fees (T. I 89). At the September 20, 1965 hearing Mr. Jacobowitz, the trustee's attorney, stated as follows:

"Your Honor, with the exception of the matter of attorney's fees, upon which we do not propose to present evidence at this time, we rest."

The Supreme Court of Arizona has stated that in order for attorney's fees to be awarded, there must be some evidence in the record supporting such an award. *Crouch v. Pixler* (1958) 83 Ariz. 310, 320 P.2d 943; *Mason v. Mason* (1945) 108 Utah 428, 160 P.2d 730; *Muckle v. Hill* (1920) 32 Idaho 661, 187 P. 943; *United States Fidelity & Guaranty Co. v. Zidell-Steinberg Co.* (1935) 151 Ore. 538, 50 P.2d 584, 51 P.2d 687; 7 *Am. Jur., Bills and Notes*, § 142, p. 869.

In addition, appellants contend that the bankruptcy court was without jurisdiction to make such an award for the reason that such power is not granted to the Referee under summary jurisdiction authority. A careful analysis of the Referee's decision discloses that the turnover is ordered not because appellants owe Fike money under the subcontract, but because the money came into the constructive possession of Fike before appellants came into possession. The only basis upon which the Referee can award attorney's fees, assuming he has jurisdiction, would be through the failure of the appellants to pay the monies due Fike *under its subcontract*. It is clearly the law that the bankruptcy court does not have summary jurisdiction to collect debts owing the bankrupt,



especially when the Court attempts to found its award on an imagined "trust theory."

### CONCLUSION

Appellants have attempted to show that the evidence and the law in this case is sufficient to establish the requisite mutuality to allow the appellant McKee to effect its right of set-off. For the reasons stated, it is respectfully submitted that the District Court's Order affirming the Referee's Turnover Order be reversed, that McKee's right of set-off be established, that the warranty period be established as expiring not prior to December 11, 1965, that the trustee be denied attorney's fees, and that the cause be remanded with instructions to fix the exact amount owing to the trustee.

JENNINGS, STROUSS,  
SALMON & TRASK

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*Attorneys for Appellants*

August, 1966

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William F. Haug

**(Appendix Follows)**

## APPENDIX

### TABLE OF EXHIBITS

<i>Exhibit No.</i>	<i>Description</i>	Page number of T. I where identified	Page number of T. I where admitted
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Trustee's No. 3	Tucson House Subcontract	6	53
Trustee's No. 4	Tucson House Surety Bond	7	53
Trustee's No. 5	Lincoln Hospital Surety Bond	9	53
Trustee's No. 6	Fike's Notice and Claim of Lien re Tucson House	10	53
Trustee's No. 7	Letter dated November 17, 1964 from McKee to Fike	13	53
Trustee's No. 8	Letter dated December 5, 1964 from McKee to National Surety Corporation	15	53
Trustee's No. 9	Letter dated January 22, 1965 from attorney for Trustee to McKee	16	53
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Trustee's No. 11	Letter dated February 12, 1965 from attorney for Reliance to National Surety Corporation and McKee	18	53
Trustee's No. 12	Prototypes of checks used by Tucson House Construction Company re Tucson House	19	53
Trustee's No. 13	Letters dated September 13, 1965 and September 14, 1965 from attorney for Trustee to attorneys for Appellants	20	53

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Respondents' (Appellants') No. 6	Letter dated December 5, 1964 from McKee to National Surety Corporation	109	111
Respondents' (Appellants') No. 7	Lincoln Hospital Construction Contract	111	112
Respondents' (Appellants') No. 8	Lincoln Hospital Subcontract	113	113

# TABLE OF EXHIBITS (Continued)

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No. 21,184

IN THE  
**United States Court of Appeals**  
**For the Ninth Circuit**

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In the Matter of  
FIKE PLUMBING & HEATING Co., INC.,  
Bankrupt.

TUCSON HOUSE CONSTRUCTION COMPANY AND  
ROBERT E. MCKEE GENERAL CONTRACTOR, INC.,  
*Appellants,*

VS.

WALTER E. FULFORD, as Trustee in Bankruptcy of  
FIKE PLUMBING & HEATING Co., INC.,  
*Appellee.*

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On Appeal from the United States District Court  
for the District of Arizona

**BRIEF OF APPELLEE**

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**FILED**

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No. 21,184

IN THE

# United States Court of Appeals For the Ninth Circuit

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In the Matter of

FIKE PLUMBING & HEATING Co., INC.,  
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TUCSON HOUSE CONSTRUCTION COMPANY AND  
ROBERT E. MCKEE GENERAL CONTRACTOR, INC.,  
*Appellants,*

vs.

WALTER E. FULFORD, as Trustee in Bankruptcy of  
FIKE PLUMBING & HEATING Co., INC.,  
*Appellee.*

---

On Appeal from the United States District Court  
for the District of Arizona

---

## BRIEF OF APPELLEE

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### A STATEMENT OF THE CASE

This action was initiated by appellee in an effort to effect collection from the General Contractor of the sum of \$59,587.45 in retention funds which the latter, after having collected same from the Owner, chose to convert to a use other than paying the bankrupt plumbing subcontractor.

Ironically, appellee has been and still is resisted by a surety company—through *its own* attorneys and *at its own expense*—who had absolutely nothing to do with the contract or the job giving rise to these retention proceeds. (T. I, 24-27; Trustee's Exhibit 10.)

The salient facts of this case, when viewed in proper perspective, are as follows:

On July 5, 1962, Tucson House Construction Company, comprised of Bernard W. Robbins, Raymond S. Schiff, and Robert E. McKee General Contractor, Inc., a Nevada corporation, were awarded a cost-plus F.H.A. Construction Contract with a guaranteed handsome profit of \$557,556.00. (Trustee's Exhibit 1.) The Owner designated therein is Tucson Title Insurance Company, as Trustee under Trust No. 10578. The owners of the beneficial interest in said trust, as best as can be ascertained from the record, are Bernard W. Robbins, Raymond S. Schiff, and Seymour W. Schiff. (Trustee's Exhibit 2.)

The Construction Contract provides, among many other things, that the General Contractor, Tucson House Construction Company, had agreed "not to assign this Contract or any amount payable [t]hereunder or to sublet the whole or substantially the whole of this Contract . . ." It also provides for a 10% retention by the owner.

Several days prior, on July 2, 1962, McKee, Robbins, and Raymond S. Schiff entered into an agreement entitled "Joint Venture Agreement" for the specific purpose of forming "a joint venture which, as general contractor" would enter into the Construction

Contract previously described. (Trustee's Exhibit 2.) The rights, the responsibilities, and the duties of the co-adventurers are fully spelled out therein. Furthermore, it is said to contain all the terms and conditions of the joint venture. (T. I, 5-6.)

Seymour W. Schiff, one of the beneficial owners, was not a party to the joint venture.

A month or so later, on August 6, 1962, Tucson House Construction Company, as the General Contractor, awarded the plumbing Subcontract to Fike Plumbing & Heating Co., Inc., bankrupt (Trustee's Exhibit 3.)<sup>1</sup> The Subcontract provides, among other things, that the 10% retention proceeds would be due and payable to the Subcontractor "30 days after completion and acceptance of subcontractor's work by the owners and receipt of final payment from the owners." It also provides in Paragraph 29 thereof for attorney's fees to the prevailing party, in the event of litigation.

As a condition of the Subcontract, Fike was required, and did in fact, post a performance and payment bond running to the General Contractor. The bond was written by National Surety Corporation. (Trustee's Exhibit 4.)

By appellants' own admission, Fike had completed its work in January or February of 1964 (T. I, 64), and the beneficial owners, in the words of Mr. Haug, "actually moved in and had occupancy of the building

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<sup>1</sup>Although the Subcontract is on a McKee form, it is admitted that it was between Tucson House Construction Company and the bankrupt. See, Appellants' Opening Brief, p. 3.

in February, 1964." (Trustee's Exhibit 14, Answer to Trustee's Interrogatory No. 13.) According to the same Answer, the F.H.A. had accepted the project as 100% complete on June 22, 1964.

During the course of Fike's work, all progress billings were submitted to Tucson House Construction Company and were paid by *it*, on *its own* checks, drawn on *its own* bank accounts. (T. I, 20-21.)

In August of 1964, not having received its retention proceeds, Fike filed with the Pima County Recorder's office a Notice and Claim of Lien in the form prescribed by Arizona statutes. (Trustee's Exhibit 6.) Through inadvertence or neglect, a copy of the Notice and Claim was never formally served upon the Owner, namely, Tucson Title Insurance Company, as Trustee.

The Notice and Claim was filed at the request of McKee, and its existence—having been made a matter of record—became known to McKee and the Owner in the early part of December, 1964 (T. I, 122), before the final settlement day. As a condition of releasing the final payment, the Owner required and obtained from the General Contractor a Lien Release Bond. (Respondents' Exhibit 12.)

In June of 1963 the bankrupt was awarded by McKee, in its individual capacity and as General Contractor, the plumbing Subcontract on the John C. Lincoln Hospital Job. (Respondents' Exhibit 8.) As a condition of receiving this Subcontract, Fike was required to post a performance and payment bond running, of course, to McKee as the General Contractor. The bond was posted. The surety on this bond was Standard



Accident Insurance Company, which has since merged with Reliance Insurance Company. (Trustee's Exhibit 5.)

On November 17, 1964—the very day that Fike was adjudged a bankrupt—Mr. Dale of McKee wrote Fike a registered letter from El Paso, Texas, in regard to the Lincoln Hospital Job, advising the latter that McKee had elected to declare Fike “in default and to call upon [its] bonding company to complete this work and see that all bills are paid.” (Trustee's Exhibit 7.) The letter was received on November 19, 1964. (T. I, 6.) The bonding company—Reliance Insurance Company—immediately took over and thereafter completed Fike's job. (Trustee's Exhibit 14; Answer to Trustee's Interrogatory No. 30.)

At the time of Fike's bankruptcy, on November 17, 1964, Fike ostensibly owed \$50,745.12 to its suppliers on the Lincoln Hospital Job. (T. I, 117.)

On December 5, 1964, Mr. Dale, writing *for* Tucson House Construction Company, advised National Surety Corporation, Fike's surety on the Tucson House Job, that he had decided to retain Fike's retention proceeds for the life of the one-year warranty, which he calculated would commence on December 10, 1964, and to pay off certain unpaid suppliers of Fike who had furnished labor or supplies to Fike on the Tucson House Job (Trustee's Exhibit 8). (Interestingly, not a word was said by Mr. Dale in regard to using these proceeds for any setoffs.)

On January 22, 1965, the bankruptcy trustee made a demand upon Tucson House Construction Company

—although the letter was simply addressed to McKee, because it was the managing co-adventurer—for the immediate release or payment of the Tucson House Job retention proceeds “less any credits for [its] payment of any material suppliers who had valid claims for materials furnished on the subject job. (Trustee’s Exhibit 9.)

On February 10, 1965—almost three months after Fike’s bankruptcy—McKee and Reliance, with the consent of National Surety Corporation, reached an accord whereby McKee agreed to use Fike’s retention proceeds on the Tucson House Job for the payment of the suppliers on the Lincoln Hospital Job, with the proviso that Reliance would “protect, indemnify and hold harmless McKee . . . from and against all loss, damage and expense (including attorneys’ fees)” on account of any claim made against it by anyone *and specifically the bankruptcy trustee*. Furthermore, Reliance agreed to defend such an action in the name of McKee, or otherwise, “but at the sole cost and expense of Reliance.” (Trustee’s Exhibit 10.) The entire scheme was predicated, in the words of Mr. Haug—the admitted author of this Exhibit, prepared by him while representing both McKee and Reliance (T. I, 24) and being a member of the creditors’ committee in the bankruptcy proceedings (Referee’s Finding of Fact 19)—upon this basis, to wit:

“ . . . Reliance claims this right to require this offset by virtue of its right of subrogation to the rights of McKee arising out of the relation of principal and surety under law and equity.” (Trustee’s Exhibit 10.)

On February 19, 1965, Tucson House Construction Company promptly transferred \$50,745.12 of Fike's retention proceeds to McKee, and McKee—armed with the indemnity by Reliance—disbursed same among Fike's suppliers on the Lincoln Hospital Job.

Even before the transfer, on February 16, 1965, Mr. Dale, in a letter to counsel for appellee, opined, unequivocally:

“... There will therefore be no proceeds remaining on the Tucson House which will be available to the bankruptcy court.” (Trustee's Exhibit 17.)

On March 15, 1965, the trustee, while still somewhat in the dark as to the precise details, filed his Petition for a Turnover Order, and on September 8, 1965, he amended same in line with the products of his investigation.

The Bankruptcy Referee, sitting as a trial Court, and the District Court, sitting as a reviewing Court, have both concluded that the bankruptcy trustee is entitled to the retention proceeds on the Tucson House Job, i.e., the sum of \$59,587.45, less \$2,765.45 which was paid to Fike's suppliers on the Tucson job and \$1,375.87 which was expended by Tucson House Construction Company on warranty items.

Moreover, the trustee was also awarded interest and attorney's fees.

Hence this appeal.

### A SUMMARY OF THE ARGUMENT

I. The trustee maintained below, and still maintains, that the attempted setoff by McKee, though ingenious it may be, is not permissible under Section 68 of the Bankruptcy Act (11 U.S.C., §108), for want of "mutual debts". The requisite mutuality is lacking for all or either of these reasons:

A. Fike owed nothing to McKee at the time of its bankruptcy. Fike's obligation stemming from the unpaid bills on the Lincoln Hospital Job was first and foremost *its* obligation. It, and it alone, was *the primary debtor*. Any secondary debtor, be it McKee or Reliance, could only be subrogated to the rights of the suppliers whose claims it paid. These suppliers, i.e., creditors, admittedly had no right of setoff against Fike.

B. The debt owing from Tucson House Construction Company, a joint venture, to Fike, and the debt owing by Fike to McKee individually, if any, by reason of the unpaid bills on the Lincoln Hospital Job, are not *owned* and *owed* in the same right by the same parties in the same capacity.

C. The retention proceeds here in issue were in the nature of trust funds, and moreover, were wrongfully obtained by McKee from Tucson House Construction Company, even if the latter received same rightfully from the Owner after Fike's bankruptcy.

II. McKee itself had no right to effect a setoff in the manner attempted by it; consequently, Reliance Insurance Company, as subrogee to the rights of McKee, could not have compelled McKee to do what

it itself had no right to do. It is the settled law that one cannot acquire by subrogation what another, whose rights he claims, did not have.

Moreover, it is also settled that a surety is subrogated only to those rights of the obligee against the principal which stem from the contract for which the surety is bound. In other words, the rights of an obligee (McKee) against a principal (Fike) which stem from matters unrelated to the contract for which the surety is bound do not inure to the benefit of the surety (Reliance). Here the Tucson House Job was wholly unrelated to the Lincoln Hospital Job. It, therefore, follows that Reliance, as surety on the Lincoln Hospital Job, can't avail itself of any benefits that McKee might have had in the retention proceeds under the Tucson House Job.

Last but not least, A.R.S. §12-1641, granting a surety the right to require an obligee "to bring an action upon the contract" against the principal, if the obligee is not "under legal disability" to do so, has no application to the case at bar, and even if it does, it has not been complied with.

III. An award of interest on a liquidated debt is a proper item of damages, and an award of a reasonable attorney's fee, when so provided for by contract, is a proper item of costs.



## ARGUMENT

### I. THE ATTEMPTED SETOFF IS INVALID FOR ALL OR EITHER OF THESE REASONS:

#### A. Fike Owed McKee No Debt.

Appellants readily admit that “one of the things they must show is that Fike owed a debt to McKee.” That is, of course, true, but in order to prevail they must also show that the debt, if any, was owed by Fike to McKee *at the time of its bankruptcy*, for “the rights of parties under §68 are adjusted as of the date of bankruptcy.” 4 *Collier, Bankruptcy* (14th Ed.), §68.10[1], page 754; *Prudential Insurance Co. of America v. Nelson* (1939), 6 Cir., 101 F.2d 441, cert. den. 308 U.S. 583, 60 S.Ct. 106, 84 L.Ed. 489.

The trustee submits that appellants failed in their proof and the burden is clearly theirs. 4 *Collier, Bankruptcy* (14th Ed.), §68.10[2], page 759.

When Fike received formal notice of its default several days after its bankruptcy, it owed \$50,745.12 to its suppliers on the Lincoln Hospital Job. Because these debts were incurred by Fike, they were naturally first and foremost *its debts*. Fike, and Fike alone, was *contractually*—in the classical privity of contract sense—bound to pay them. In brief, Fike was the *primary debtor*.

Upon Fike's default the responsibility for paying these debts and to complete Fike's plumbing Subcontract devolved upon Reliance Insurance Company. This was clearly the nature of Reliance's undertaking under its performance and payment bond, of which McKee was the obligee. *American Casualty Co. v.*

*Town of Shattuck, Okla.* (1964), 228 F.Supp. 834, 838 (W.D. Okla.). Thus, Reliance became the *secondary debtor*.

In fact, upon Fike's default and failure to pay these obligations, Reliance was subject to a direct suit by these suppliers as third party beneficiaries under its bond, i.e., its surety contract with McKee. *Griffith v. Stucker* (1913), 91 Kan. 47, 136 P. 937, 939.<sup>2</sup> *Pacific States Electric Co. v. United States F & G Co.* (1930), 109 Cal.App. 691, 293 P. 812, 813.<sup>3</sup>

Now, as between McKee and these suppliers there was obviously no privity of contract, thus, McKee was not personally responsible for the payment of these debts. In Arizona an owner is not *personally* responsible for the payment of his contractor's debts incurred during the course of construction unless the contractor was his "agent" in the classical sense of the term. *Keefer v. Lavender* (1952), 74 Ariz. 24, 243

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<sup>2</sup>"These claims were debts of Lightfoot Bros. [the subcontractor] and not of Stucker [the general contractor]. They were primarily liable to their own laborers and materialmen. Stucker was in effect only a surety of his subcontractor, and the very purpose and object of the bond was to secure payment by Lightfoot Bros. of their own debts, a matter of direct and special importance to those to whom they were indebted. This being true . . . establishes the right of the laborers and materialmen employed by Lightfoot Bros. to adopt the bond and enforce it by action brought directly against the surety company which signed it."

<sup>3</sup>"The obligation of the respondent [as surety of the subcontractor] in the present cases to guarantee payment for labor performed and materials furnished under the subcontract seems fixed and certain. *The fact that these claimants may have been entitled to recover compensation from the original general surety, Metropolitan Casualty Insurance Company, does not release the respondent from the clear obligations of its contract . . .*" (Emphasis supplied.)

P.2d 457. The same case further holds that the mere relationship of owner and general contractor does not in and of itself raise such an agency relationship. The same reasoning equally applies to the relationship of general contractor and subcontractor, i.e., the latter is not the former's agent by virtue of this relationship alone. Since Fike was obviously not McKee's agent, it could not have bound McKee for the payment of these debts.

It is true, of course, that McKee was responsible under its contract with the Owner to deliver the subject job free and clear of all claims and liens. This undertaking, however, bound it *only to the Owner* and certainly not to the suppliers of Fike. The provisions of its contract ran to the Owner, and they did not inure to the benefit of Fike's suppliers for obvious lack of privity of contract. It is also true that McKee, with General Insurance Company of America as its surety, posted a performance and payment bond running to the Owner, but this undertaking, insofar as it pertains to Fike's subcontract and its suppliers thereunder, was merely in the nature of being a surety for a surety, i.e., it would have become operative only upon the refusal or inability of the underlying surety, namely, Reliance Insurance Company, to perform its undertaking. Cf. *Griffith v. Stucker*, supra. Even if it be assumed that a direct action might have been brought against McKee under this bond—there is, of course, no evidence in this record to show that Fike's suppliers ever made a demand upon McKee or that they complied or could have complied with the terms

and conditions thereof—McKee would have had a right to cross-claim against Reliance. *Pacific States Electric Co. v. United States F & G Co.*, supra.<sup>4</sup> In fact, as is suggested in the latter case, in order to avoid a circuitry of actions, it is by far the better practice to require the suppliers of the subcontractor to sue the surety of the subcontractor, even if they could have sued the surety of the general contractor in the first instance.

Thus, McKee was at best but third in line as to responsibility for paying these obligations. Because of Reliance's clear duty and ability to respond, McKee's contingent liability never came into existence. Its paying of these obligations—in *form* but certainly *not in substance*—almost three months after Fike's bankruptcy could not place it into the position of a *creditor* of the bankrupt as of the date of its bankruptcy.

Absent a debt due McKee from Fike, i.e., it being a creditor of Fike as of the date of its bankruptcy, there is nothing against which it could effect a setoff under §68 of the Act.

Even if it be assumed, for the sake of argument, that McKee was obligated to pay these suppliers because of Fike's insolvency and that it did in fact do so, its claimed right of setoff must fail nevertheless

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<sup>4</sup>" . . . In the event of securing judgments against the original general surety by the claimants in this action, it would then be entitled to be subrogated to all the rights of these plaintiffs for the purpose of reimbursement, which would include the right to resort to respondent's bond [the surety for the subcontractor] to satisfy their claims."

by virtue of Section 57(i) of the Bankruptcy Act, which is to the effect that a secondary debtor—it will be remembered that McKee is not a primary debtor—is subrogated, as a matter of law, to the rights of the creditor of the primary debtor whose obligation he paid.

To be more specific, §57(i) (11 U.S.C., §93) provides in pertinent part as follows:

“Whenever a creditor whose claim against a bankrupt estate is secured, in whole or in part, by the individual undertaking of a person, fails to prove and file that claim, that person [the surety] may do so in the creditor’s name, and he [the surety] shall be subrogated to the rights of the creditor, whether the claim has been filed by the creditor or by him in the creditor’s name, to the extent that he discharges the undertaking . . .”

An excellent dissertation on the meaning and effect of §57(i) is found in *Phoenix Indemnity Co. v. Earle* (1955), 9 Cir., 218 F.2d 645, 650. There this Court quoted and approved this language, now found in 3 *Collier, Bankruptcy* (14th Ed.), §57.21, pp. 335-336, to wit:

“The surety normally has against the principal a claim, express or implied, absolute or contingent, to be indemnified or reimbursed. Without §57i there could be no doubt but that such a claim is provable by the surety in the same manner any other claim provable under §63a [11 U.S.C.A., §103, sub. a] may be presented, namely as the surety’s own claim against the bankrupt principal debtor. Section 57i flatly *denies* this right. It confines the secondary debtor to a proof



of the *creditor's* claim, in the *creditor's name*. 'A creditor may indeed prove against both principal and surety, but that is because he has two separate claims, really he has security upon a single claim. But there can never be more than one claim against the principal.' It is this *one* claim, namely the creditor's claim, that the surety may prove prior to or after subrogation, and not his own claim upon an agreement, express or implied, of indemnity."

Admittedly, the suppliers to whose rights McKee or Reliance could be subrogated have no right of set-off against Fike. There exists, of course, no "mutual debts" between these suppliers and Fike. Consequently, McKee or Reliance as successor to their interests can likewise have no right of setoff against Fike. In fact, to be technical, McKee is not entitled to any subrogation whatsoever, for, as is said in *Simpson on Suretyship*, §47, page 209:

"A volunteer who pays, not being legally or morally obligated to do so, is not entitled to subrogation."

**B. A Debt Due a Bankrupt From a Partnership Cannot Be Set Off Against a Debt Due by the Bankrupt to an Individual Partner.**

The Joint Venture Agreement, the sole and certainly the best evidence with respect to the formation of Tucson House Construction Company, clearly shows that the parties thereto intended to, and did in fact, create a valid joint venture. The argument that Tucson House Construction Company was McKee, and vice versa, i.e., that the former was but a front

and subterfuge for the latter, borders on the criminal, for this is not the picture that was represented to the F.H.A.<sup>5</sup> Cf., 18 U.S.C.A., §1010. It is, however, of no avail herein to McKee, for all the elements of a joint venture can readily be found within the confines of the Joint Venture Agreement itself. The joint venture was obviously created via a contract, by people who have pooled their skills, efforts and resources, with a common purpose of obtaining a lucrative construction contract, to own it jointly, and to perform it successfully with a view of apportioning the profits—and possibly the losses—between themselves. The fact that the profits and losses of the joint venture were not to be, necessarily, borne equally and that two of the co-adventurers relinquished a good deal of the control to McKee, who undertook to act at all times “in behalf of the joint venture” does not alter the legal efficacy of the joint venture. 30 *Am. Jur.*, Joint Adventures, §§6 through 11, and §40.

Moreover, it is immaterial whether McKee believes that a joint venture did or did not exist, for, as to third parties, “the relation will be determined from the facts rather than the conclusions of the co-partners . . .” *Mercer v. Vinson* (1959), 85 Ariz. 280, 287, 336 P.2d 854.

It is the settled law that an essential element of mutuality under Section 68(a) of the Bankruptcy Act, 11 U.S.C. §108, is that “the debts or credits must be in the same right and between the same parties, standing in the same capacity.” 4 *Collier, Bankruptcy*,

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<sup>5</sup>See, Construction Contract, Trustee’s Exhibit 1.

§68.04[2.1]; *Lyders v. Petersen* (1937), 9 Cir. 88 F.2d 9. Cf. *In re Berger Steel Co.* (1964), 7 Cir., 327 F.2d 401. It is, therefore, also the settled law that a debt due a bankrupt from a solvent partnership may not be set off against a debt due from the bankrupt to an individual member of such partnership. 4 *Collier, Bankruptcy*, §68.04[2.2]; *In re Shults* (1904), 132 F. 573 (D.C. N.Y.); *In re T. M. Lesker & Son* (1910), 176 F. 650 (D.C. Pa.); *In re Bank of Sampson* (1934), 205 N.C. 333, 171 S.E. 436. This is true even if such a partner were severally responsible for the payment of the obligation of the partnership. *Poncet Davis Co. v. Roberts* (1943), 5 Cir., 138 F.2d 538. In fact, appellee is unaware of a single bankruptcy case wherein a partnership debt was permitted to be set off against an individual debt, and vice versa. If appellants know of one, they have never cited it.

There is, indeed, a good reason for this rule, it being that a partnership debt is first and foremost the responsibility of the partnership. The liability of a co-partner becomes his several obligation only when the partnership property is inadequate to pay the partnership debts or when there is no effective remedy without resort to his individual property. *Friedman v. Gettner* (1948), 180 N.Y.S.2d 446, aff. 163 N.E.2d 141. Arizona law is clearly to the same effect, *Springer v. Bank of Douglas* (1957), 82 Ariz. 329, 313 P.2d 399.

The fact that in *Springer* there was a mortgage to secure the partnership obligation represented by a note does not alter the proposition that partnership debts should be first paid out of partnership assets.

for in Arizona one may sue upon a promissory note secured by a mortgage without resort to the mortgaged security. In other words, foreclosure of a mortgage is a separate equitable remedy which one may or may not invoke in a suit for the collection of the debt represented by the note. *Smith v. Mangels* (1952), 73 Ariz. 203, 240 P.2d 168.

Moreover, if there were a choice as to whether a creditor may sue the partnership or one of its partners individually, logic dictates that the choice would lie with the creditor. Here the trustee, as a creditor of Tucson House Construction Company, elected to sue the joint venture for the retention proceeds, and it is certainly not within McKee's province to compel him to sue it individually.<sup>6</sup>

The case of *In re Sherman Plastering Corporation* (1965), 2 Cir., 346 F.2d 492, so heavily relied upon by appellants, is readily distinguishable from the case at bar. In fact, but for some superficial resemblance, it is not even analogous to the case at bar. There Hanover *owned* its claim against the bankrupt in its own right, and it proved same in its own name and in its own right, as it had a right to do.<sup>7</sup> Here McKee did not own a claim against Fike at the time of the bankruptcy; thus, if McKee had filed a Proof of Claim in the bankruptcy proceedings based upon its post-bank-

<sup>6</sup>McKee is named individually as one of the respondents, but this stems from its conversion of \$50,745.12 from Tucson House Construction Company.

<sup>7</sup>"A surety who has satisfied the creditor prior to the filing date in his principal's bankruptcy therefore proves his own claim, not that of the original creditor, and Section 57i does not apply." 3 *Collier, Bankruptcy*, §57.21[2], page 338.

ruptcy payment of Fike's suppliers on the Lincoln Hospital job—which it did not—by virtue of 57(i), such a claim would have had to be *not* in its own name and *not* in its own right, but that of a subrogee.<sup>8</sup> In *Sherman* the claim owed by Hanover to the bankrupt was its own debt, i.e., its own obligation with the sole exception that it stemmed from a co-surety relationship. But even as a co-surety, it was specifically bound by the terms of the jointly executed bond “severally”. Here the debt is not owed by McKee but by a solvent partnership of which it is but one of the members. In *Sherman*, because the joint obligation did not stem from a partnership obligation, the Court did not concern itself with partnership law. This is clearly pointed out in the Court's decision by this language, found on page 495:

“Viewed in one light, Neaderthal deals with the problem of a set-off *in the context of law of partnership, not at all involved in our case.*” (Emphasis supplied.)

Moreover, there the Court could rightfully say, and did in fact say, on page 493, that the debts were “owed [Hanover] and owned by the same party [Hanover] acting in the same capacity.” This is obviously lacking herein.

Last but certainly not least, *Sherman* does not state the proposition that a joint debt, and particularly a partnership debt, can always be set off against a sepa-

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<sup>8</sup>“If the surety discharges the debt after commencement of the bankruptcy proceedings against his principal, §57i applies” 3 *Collier, Bankruptcy*, §57.21[2], page 339.



rate debt, and vice versa. It merely states an exception to the rule.

It is hard to conceive how the debt sought to be set off herein—which is not owned by McKee in its own right, to begin with—even approaches mutuality with that owed Fike by Tucson House Construction Company.

**C. There Can Be No Set-Off Against Trust Funds or Wrongfully Obtained Proceeds.**

It is settled beyond doubt that there can be no set-off against trust funds or wrongfully obtained proceeds. *Morris v. Windsor Trust Co.* (1914), 213 N.Y. 27, 106 N.E. 753, 754;<sup>9</sup> *Emerson v. Fisher* (1918), 1 Cir., 246 F. 642, 649; *Irving Trust Company v. B. Altman & Company* (1933), 270 N.Y.S. 781; *Levy v. Drew*, 4 Cal.2d 456, 50 P.2d 435; 9 *Am. Jur.* 2d 405, Bankruptcy, §522;<sup>10</sup> 4 *Collier, Bankruptcy* (14th Ed.), §68.04[2.1], page 73.

There is indeed no dissent to this view.

Appellee contends that a trust fund or quasi-trust fund did, in fact, exist herein by virtue of the bankrupt's filing of a Notice and Claim of Lien. There is no challenge about it having been filed timely and in the proper manner. Its legal efficacy is challenged upon the sole ground that a copy of same was not

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<sup>9</sup>"A wrongdoer who has misapplied the subject of a trust is not entitled, either under the Bankruptcy Act or under the rules of equitable set-off, to apply a credit that belongs to him in his own right in cancellation of his liability as a fiduciary."

<sup>10</sup>"A creditor's unauthorized possession of funds of the bankrupt can give the creditor no right to apply them in payment of his own claim to the prejudice of the rights of other creditors."

served upon the owner, which, it will be recalled, is Tucson Title Insurance Company, as Trustee. To begin with, this defense would seem to be available only to the owner. It is not a party to these proceedings. Furthermore, the primary object of A.R.S. §33-981, authorizing the filing of a laborer's or materialman's lien, is to insure to the laborer and materialman who enhanced the value of another's property the payment of their accounts, and the object of A.R.S. §33-993, requiring that a copy of the Notice and Claim of Lien be served upon the owner, is to protect the owner from double payment, i.e., from first paying off the contractor and "later find his property plastered with liens of laborers and materialmen whose accounts had been left unpaid." *Arizona E. R. R. Co. v. Globe Hardware Co.* (1913), 14 Ariz. 397, 490, 129 P. 1104. These statutes, the Arizona Supreme Court has held, are remedial and should therefore be liberally construed in favor of the laborer and materialman. *Leeson v. Bartol* (1940), 55 Ariz. 160, 99 P.2d 485. Here the latter object was unquestionably met, inasmuch as the owner learned of the existence of the lien before final settlement. Moreover, McKee knew of its existence all along, for it asked Fike to file same. In fact, the owner was so cognizant of its existence that it insisted upon a Lien Release Bond as a condition of releasing the retention proceeds. Such a bond was filed, and consequently the proceeds here in issue were released to Tucson House Construction Company. The mere obtaining of the proceeds under these circumstances, appellee submits, was wrongful, because, as was said in *U.S. v. Durham*

*Lumber Company* (1958), 4 Cir., 257 F.2d 570, 573, aff. 363 U.S. 522, 80 S.Ct. 1282, 4 L.Ed. 1371, under the North Carolina lien statutes:

“The obligation of the owner to the subcontractor [after he filed a lien] is, thus, primary; his obligation to the general contractor, secondary.”

To the same effect, See *Green v. H. E. Butt Foundation* (1954), 5 Cir., 217 F.2d 553.

To add insult to injury, Tucson House Construction Company later turned over to McKee the sum of \$50,745.12, so as to permit the latter to use same for purposes other than paying Fike.

Certainly, under these circumstances, McKee had no right to acquire possession of these proceeds, let alone offset an unrelated claim, not even belonging to it, against same.

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## II. RELIANCE HAD NO RIGHT TO COMPEL MCKEE TO OFFSET.

As has already been shown, McKee had no right to effect the attempted setoff for want of mutual debts. If McKee itself could not effect a setoff, then *a fortiori* Reliance, as subrogee to the rights of McKee, could not have compelled it to do so. It is certainly the settled law that one cannot acquire by subrogation what another, whose rights he claims, did not have. *United States v. Munsey Trust Co.* (1947), 332 U.S. 234, 91 L.Ed. 2022, 67 S.Ct. 1599.

Moreover, even if McKee had a right to effect the attempted setoff in its own right, Reliance could not have availed itself of that right, for a surety is subrogated only to those rights of the obligee against the

principal which stem from the contract for which the surety is bound. In other words, here Reliance was entitled to be subrogated to McKee's rights stemming out of the Lincoln Hospital Subcontract with Fike. Reliance was, in fact, so subrogated, for it collected Fike's unpaid progress payments and the retention proceeds which McKee had withheld from Fike under the said Subcontract. That is, however, where Reliance's right of subrogation must stop. As is said in 83 *C.J.S.* 681, Subrogation, §52:

“Furthermore, *a surety will be subrogated only to such rights and securities as are held by the creditor with respect to the particular debt or contract for which the surety is bound.*” (Emphasis supplied.)

Supporting this statement are three cases, namely, *U. S. F. & G. Co. v. First National Bank of Lincoln* (1932), 224 Ala. 375, 140 So. 755; *American Surety Co. of New York v. Town of Islip* (1944), 48 N.Y.S. 2d 749; and *Fidelity & Casualty Co. v. Copenhagen Contracting Co.* (1932), 159 Va. 126, 165 S.E. 528. The last case is particularly in point, for it held that a surety of a defaulted contractor has no right to claim funds due to the defaulted contractor under another contract.

Yet, it will be remembered that *subrogation* is the sole basis upon which Reliance ostensibly “compelled” McKee to effect the attempted setoff. Said Reliance (Mr. Haug) to McKee (Mr. Haug):

“... Reliance claims this right to require this offset by virtue of its right of subrogation to the

rights of McKee arising out of the relation of principal and surety under law and equity." (Trustee's Exhibit 10.)

Appellants now argue vociferously that "Reliance had a legal right under A.R.S. Sec. 12-1641 . . . to compel McKee to proceed against Fike by exercising its right of setoff." While this is charitable on the part of McKee towards Reliance, it is devoid of any merit.

But for the provisions of A.R.S. §12-1641, appellants would admit that upon Fike's default Reliance had no right to compel McKee, as obligee, to proceed against Fike, as principal, in any manner whatsoever. An excellent statement of the rule, and of the reason for it, is found in *Simpson on Suretyship*, §42, page 173, to wit:

*"As a general rule, the surety has no right against the creditor to compel the latter to attempt collection of the debt from the principal. Mere passiveness or lack of diligence on the creditor's part has no effect upon his right against the surety. It is for the surety to pay or see that his principal pays. One of the creditor's purposes in demanding the security of the surety's promise is to avoid the burden and delay incident to enforced collection. This consideration justifies the decisions that the surety is not discharged because the creditor fails to proceed against the principal until his remedy is barred by the statute of limitations. It likewise justifies the general rule that the creditor's failure to realize upon security is no defense to the surety."* (Emphasis supplied.)



Assuming that this statute is applicable herein, has Reliance complied with the provisions thereof so as to remove the instant case from the common law rule? Appellee thinks not, particularly in view of the fact that under the accepted rules of statutory construction, all statutes in derogation of the common law must be strictly construed. *Richardson v. Ainsa* (1908), 11 Ariz. 359, 95 P. 103, aff. 31 S.Ct. 23, 218 U.S. 289, 54 L.Ed. 1044.

The statute provides, in part, that a "surety upon a contract for payment of money or performance of an act . . . may require, by notice in writing, the creditor or obligee forthwith to bring an action upon the contract." There is absolutely nothing in the record before this Court to indicate that a "notice in writing" was given by Reliance to McKee requiring the latter "forthwith to bring an action upon the contract." In order to render the provisions thereof operative, proof of such notice is obviously essential. In fact, in Indiana, under a statute identical to the one here in issue, it was held that the proof of notice must be in the same manner and form as is provided by statute for serving other legal notices. *McCoy v. Lockwood* (1880), 71 Ind. 319. Moreover, the notice, which has to be in writing, must unconditionally require suit to be brought forthwith. The mere leaving out of the word "forthwith" was held to be defective notice in two Indiana decisions, namely, *McMillin v. Deardorf* (1897), 18 Ind.App. 428, 48 N.E. 233; *Frye v. Eisenbiess* (1914), 56 Ind.App. 123, 104 N.E. 995. In contrast, here no notice of any kind was given.

There are at least two additional reasons why A.R.S. §12-1641 is not applicable herein.

First, it is to be noted that the statute may be rendered operative only when the obligee is not under "legal disability" to bring an action upon the contract against the principal. Here McKee was indeed under a "legal disability" to bring an action against Fike, for one may not sue a bankruptcy trustee, who succeeds to all the rights of a bankrupt after his adjudication, without permission of the Bankruptcy Court. 1 *Collier, Bankruptcy* (14th Ed.), §2.36[1]. No such consent was sought or obtained by McKee.

Secondly, if one pauses to reflect, it becomes evident that the object of the so-called *Pain v. Packard* doctrine—not a favorite of the law—and the provisions of A.R.S. §12-1641 which permit a surety to require his obligee to bring an action upon the contract against the principal as soon as the obligation becomes due is to minimize the risk that thereafter the principal might become insolvent and thus render the obligation, which was previously collectible, uncollectible. But once the principal is already insolvent, as in the case at bar, it seems foolish to permit a surety to require an obligee to go through an idle and fruitless ceremony. Since the law does not require futile things, it is fair to conclude that the provisions of this statute have no application herein.

It is, thus, clear beyond legitimate doubt that Reliance had no right to compel McKee to use Fike's proceeds from a wholly unrelated job to satisfy the claims of Fike's suppliers on the Lincoln Hospital

Job which Reliance was legally obligated to pay under its surety contract.

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### III. INTEREST AND ATTORNEY'S FEES.

The lower Court, after having found that the retention proceeds here in issue were due and payable to the bankrupt on January 11, 1965—thirty days after receipt of final payment from the Owner—awarded the bankruptcy trustee interest on such proceeds as of that date. All authorities agree that interest on a liquidated sum is a proper item of damages in favor of the person who was deprived of the use of such proceeds. The Arizona Supreme Court, in approving this rule, said:

“It is settled law in this jurisdiction that a creditor is entitled to interest on money withheld after due as damages for the loss of its use . . . [and it is] the duty of the Court to add it to the judgment.”

*Southwest Mines Development Co. v. Martignone* (1937), 49 Ariz. 88, 92, 64 P.2d 1031.

To the same effect, see 22 *Am. Jur.* 2d, Damages, Section 180.

The appellants argue that they were entitled to keep the proceeds here in issue during the life of Fike's warranty on the Tucson House Job, which they claim commenced on December 11, 1964, and ended on December 11, 1965. Firstly, they had no right to do this, for the contract between them admittedly does not so provide. Secondly, they had the assurance of

National Insurance Company, Fike's surety, on that job, which covered Fike's warranty as well.

Moreover, subsequent events have shown that but a fraction of these proceeds were used on warranty items on the Tueson House Job. Consequently, if appellee's position is sustained, it is only fair that appellants be required to pay interest on these proceeds for the duration that they withheld same from him. This places no hardship and results in no inequity to appellants, for they had the use of these proceeds or could have placed same into interest-bearing deposits or securities and thereby earn all or substantially all of the interest which is charged against them by the Court's award.

As to attorney's fees, appellants complain that the Bankruptcy Court had no jurisdiction to award such fees to begin with, and if it did, the award was improper for lack of evidence. On the first point they offer no supporting authorities whatsoever, and on the other point they offer inapplicable State authorities.

Section 2(a)18 of the Bankruptcy Act expressly authorizes Courts of Bankruptcy to tax costs. The Federal Rules of Civil Procedure, when not inconsistent with the Act, apply in bankruptcy proceedings as well. General Orders in Bankruptcy, General Order 37. Under Rule 54(d), Federal Rules of Civil Procedure, attorney's fees, when provided for by contract, may be taxed as an element of costs. 1 *Collier, Bankruptcies* (14th Ed.), §2.71; 6 *Moore's Federal Practice* (2nd Ed.), §54.77[2]. This is true under Arizona law.

*Commercial Standard Insurance Co. v. Cleveland* (1959), 86 Ariz. 288, 345 P.2d 210. Here such fees were, of course, provided for by contract.

The term "Court" is defined in Section 1(9) of the Act so as to include proceedings before a Referee as well. Hence, the awarding of attorney's fees is clearly a proper exercise of a Referee's jurisdiction. *In re Swofford* (1952), 112 F.Supp. 893 (D.C. Minn.).

As to the amount of the fee and the manner of proving same, all authorities agree that these are matters which are left to the sound discretion of the trial Court. Since neither the quantum of the fee nor the manner of proving same involves State substantive law, the Federal Court is not bound to follow State procedures with respect thereto. In Federal courts no evidence is required as to the quantum of the fee when the fee is set by the trial judge who heard the case. Indeed, this makes good sense, for he is in the best position to judge the true value of the services of the attorney appearing before him. 7 *Am. Jur.* 2d 197, Attorneys at law, §269.

A bankruptcy case in point is *Campbell v. Green* (1940), 5 Cir., 112 F.2d 143, 144. Another case in point is *Curran v. Security Insurance Company* (1961), 195 F.Supp. 562 (D.C. Ark.) In the latter case, neither party offered any testimony as to the reasonable value of the fee. In making the award, nevertheless, the District Court reasoned, to wit:

"In view of the conclusion that the court has reached, the plaintiff is entitled to recover a reasonable attorney's fee, and the court, even in the



absence of testimony as to the amount of such fee, may fix the same based upon the record before it." 195 F.Supp. 562, 570.

This is precisely what the Referee did. And the District Court concurred.

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### CONCLUSION

Based upon the foregoing authorities, it is evident that the Order of the Referee, already affirmed by the District Court, is in all respects just and proper and therefore should be affirmed.

Dated, Phoenix, Arizona,  
October 3, 1966.

Respectfully submitted,  
HENRY JACOBOWITZ,  
*Attorney for Appellee.*

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### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY JACOBOWITZ,  
*Attorney for Appellee.*

IN THE  
**United States Court Of Appeals**

FOR THE NINTH CIRCUIT

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**No. 21184**

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In the Matter of  
**FIKE PLUMBING & HEATING CO., INC.,**  
Bankrupt.

**TUCSON HOUSE CONSTRUCTION COMPANY AND**  
**ROBERT E. MCKEE GENERAL CONTRACTOR, INC.,**  
*Appellants,*

v.

**WALTER E. FULFORD, as Trustee in Bankruptcy of**  
**FIKE PLUMBING & HEATING CO., INC.,**  
*Appellee.*

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**On Appeal From the United States District Court for the**  
**District of Arizona**

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**REPLY BRIEF OF APPELLANTS**

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**FILED**

**OCT 26 1966**

**WM. B. LUCK, CLERK**

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NOV 1966



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**On Appeal From the United States District Court for the  
District of Arizona**

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**REPLY BRIEF OF APPELLANTS**

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**INTRODUCTION**

The principal arguments made by the appellee have been anticipated and fully answered in our main brief. We shall confine this reply to a discussion of selected matters called into question by appellee's brief.

## ARGUMENT

### **1. Appellee's contention that the setoff is invalid for the reason that "Fike owed McKee no debt" is untenable.**

Appellants have presented four reasons for their contention that Fike is obligated to McKee as a result of its default on the Lincoln Hospital project (Appellants' Br. 11-15). It is understandable that the trustee would like to convince the Court that Fike did not owe a debt to McKee, but the "shot-gun" approach employed by the trustee detracts from his argument which, like a bat in the twilight, disappears in the sunshine of actual facts.

The trustee apparently concedes that if McKee was bound to Fike's suppliers, then Fike did owe McKee a debt (Appellee's Br. 12-13). The facts clearly show, as pointed out in our opening brief, that McKee was obligated to Fike's suppliers, and was subject to a direct suit by these suppliers, who were third party beneficiaries under McKee's payment bond to John C. Lincoln Hospital, Inc. Since McKee has in fact paid these suppliers (T.I. 39, 80), there also exists an obligation on the part of Fike to reimburse McKee.

Taking the trustee's argument at face value, one would be led to believe that McKee would never have a provable claim against Fike, even if it were unable to prove its right of set-off. The trustee apparently takes this position because McKee has ahead of it in the chain of liability a surety which has the "ability to respond", and against whom McKee would have a right to cross-claim (Appellee's Br. 12-13).

Is it the trustee's contention that an obligor's liability should depend on whether or not there is a surety on the line which is "able to respond"? What would be the trustee's position if Reliance was not "able to respond"? Presumably, under the trustee's version of the law, McKee would have a provable claim in that situation.

The trustee asserts that any debt owed by Fike to McKee would have to exist "at the time of its bankruptcy". The origin of this proposition is a general statement in *Collier*, which is subordinate to the general rule that provable claims only may be set-off against an obligation owing to the estate of a bankrupt. It is clear that the requirement of provability is satisfied by provability at the time the setoff is claimed. 9 Am. Jur.2d, Bankruptcy, §510;<sup>1</sup> *Norfolk and W. R. Co. v. Graham* (4th Cir. 1906) 145 F. 809; *Morgan v. Wordell* (1901) 178 Mass. 350, 59 N.E. 1037.<sup>2</sup> Indeed, even the maturity of a claim at the time of bankruptcy is not essential to its availability as a setoff. *New York County National Bank v. Massey* (1904) 192 U.S. 138, 24 Sup. Ct. 199, 48 L. ed. 380; *Frank v. Mercantile National Bank* (1905) 182 N. Y. 264, 74 N.E. 841.

The trustee speaks of McKee's "contingent liability" (Appellee's Br. 13), and clearly the law is to the effect that contingent debts and contingent contractual liabilities of the bankrupt may be proved. 4 *Collier*, Bankruptcy, 14th Ed., Para. 68.11, pages 760-761;<sup>3</sup> Bankruptcy Act Section 63a(8) (U.S.C. §103a(8)). Since McKee has paid Fike's suppliers (T.I 39,80) because of its obligation to do so, its contingent obligation has come into existence; and Fike's corresponding obligation to McKee may be available as a setoff under the laws cited above, even if it

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<sup>1</sup> "It is not required that the claim should have been provable in time to have been proved in the bankruptcy proceeding."

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<sup>2</sup> In the words of Mr. Justice Holmes, "'Provable' means provable in its nature at the time when the set-off is claimed, not provable in the pending bankruptcy proceedings."

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<sup>3</sup> "Thus where the bankrupt and another are joint obligors, and the other joint obligor pays the claim in full after bankruptcy, such obligor may set off the bankrupt's portion of the obligation which he paid against a debt that the obligor owed to the bankrupt estate. *This may be placed on the basis that although rights are adjusted as of the date of bankruptcy, the obligor then had a contingent debt or liability as to the payment of the bankrupt's half of the obligation which was provable under §63a(8), and which was subsequently liquidated by payment.*" (Emphasis added)

can be successfully argued that Fike's obligation to McKee was contingent only at the time of its bankruptcy.

The trustee would treat McKee as a secondary debtor, to be classified as a surety for the purposes of his argument. The fallacy of his reasoning is immediately apparent. While it is true that Fike was a primary debtor in the sense that it was contractually bound to its suppliers, when Fike filed bankruptcy it was no longer bound, or able, to pay anything. The trustee's argument and reasoning would lead one to the conclusion that Fike never entered into a subcontract with McKee, and that Respondents' Exhibit 8 never existed. The record in this case proves otherwise.

It is interesting to note that one of the cases upon which the trustee relies, *Griffith v. Stucker* (1913) 91 Kan. 47, 136 P. 937, involved a situation where the assignee of laborers and materialmen having claims against the bankrupt subcontractor had brought an action not only against the bankrupt subcontractor's surety, but also against the general contractor. It is unfortunate that the trustee did not choose to include the preceding portion of the paragraph he quoted from in that case.<sup>1</sup>

Thus the reasoning of the trustee's cited case seems to contradict his contention that "there was obviously no privity of contract" between McKee and Fike's suppliers. We contend that the *Griffith* case is authority for our contention that there was privity between McKee and Fike's suppliers because of the obligation owed by McKee to the suppliers by virtue of McKee's payment bond running to Lincoln Hospital, and its contract with Lincoln Hospital. The fact that McKee might be able to seek indemnification from

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<sup>1</sup> "It is said that the surety company can be liable only on two conditions: First, that some privity existed between Stucker [the general contractor] and the laborers and materialmen because of some duty or obligation in the premises owed by him to them, and, second, that the object of the bond was to benefit the laborers and materialmen directly and not merely incidentally. Both conditions are clearly present. Stucker was obligated by law and by his contract with the City to provide security for the payment of the claims of Lightfoot Bros. laborers and materialmen."

Reliance does not eliminate McKee's obligation on the Lincoln Hospital project. Surely, liability on a contractual obligation is not dependent upon whether or not there is a surety "able to respond".

The trustee's apparent view of the holding in *Keefer v. Lavender* (1952) 74 Ariz. 24, 243 P.2d 457 (Appellee's Br. 11), is not well-taken. The Keefer case involved an action to foreclose a mechanic's lien, and the Supreme Court of Arizona held that a personal judgment against the owner of the property on which a lien is claimed may not be rendered unless there is a contractual relation between the lienor and the owner. The *Keefer* case has no application to our fact situation. The record in the case at bar shows that there was a contract in existence between Fike and McKee (Respondents' Exhibit 8). The trustee's analogy from the Keefer case that Fike was not obligated to McKee because Fike was not McKee's agent, can best be classified as shabby reasoning, and is so obviously devoid of merit that it needs no further elaboration.

The trustee's argument regarding Section 57(i) of the Bankruptcy Act is irrelevant to the issues of this case. Section 57(i) is concerned with proofs of claim of sureties, endorsers, guarantors, and other persons secondarily liable. 3 Collier, Bankruptcy, 14th Ed., Para. 57.21 pages 331-332. We could not be more in agreement with the trustee in regard to the law he has stated as it relates to a *surety proving its claim*, but his attempt to classify McKee as a secondary debtor is a failure. The entire discussion involving Section 57(i) is apparently designed as a smoke screen to the issues of this case, and is indicative of the trustee's frantic attempts to cloud the obvious fact that McKee has a provable claim against the bankrupt estate under Section 63a, and the fact that its rights in no way are, or have ever been claimed to be, based upon Section 57(i).

What is the trustee really trying to say by this argument? It's simply this: A surety or secondary debtor, who must under Section 57(i) *prove his claim* in the name of the primary creditor,



is not entitled to set-off any claim it has against the bankrupt. None of the cases cited by the trustee support this contention. The fact that the bankrupt owes the obligation to reimburse the surety or secondary debtor is the legal basis for the mutuality necessary to allow the accomplishment of the setoff. That it could be otherwise would not only be unequitable but absurd. How else could Hanover in the *Sherman* case (*infra*) have accomplished its right of set-off. Hanover was a surety who had paid Sherman's materialmen under its bond obligation; and Section 57(i) was never mentioned in the decision nor did it have any bearing on Hanover's right of set-off.

**2. Appellee's contention that Reliance had no right to compel McKee to effect its right of set-off is contradictory to the privilege given Reliance under the laws of the State of Arizona.**

It must be remembered that the rights of Reliance are not at issue in this case. It was only over the objection of appellants that the matters concerning Reliance were injected in this case by the trustee's attorney, in what was an obvious attempt to artificially color the case in his favor. The real issue is not whether Reliance could compel McKee to make the setoff, but *whether McKee had the right to effect the setoff*.

Reliance's statutory right under Arizona Revised Statutes §12-1641 was advanced solely as an additional reason for proving Fike's obligation to McKee as a result of its default on the Lincoln Hospital project. Clearly this statute allows Reliance to force McKee to bring an action against Fike for its contract deficiencies on the Lincoln Hospital project. This is true irrespective of McKee's right to effect a setoff. Despite the trustee's argument that the *Pain v. Packard* doctrine is not a favorite of the law, it must be remembered that *it is the law of the State of Arizona*.

The trustee has attempted to prove that Reliance did not comply with the provisions of the above statute by claiming that a "notice in writing" was never given by Reliance to McKee. What better proof have we than Trustee's Exhibit 10? This docu-

ment was a "notice in writing" directed to McKee from Reliance, and while it does not require that McKee bring an action upon the contract, it is also true that "the law does not require futile things", as so eruditely pointed out by the trustee in his brief (Appellee's Br. 26). Since Fike was already insolvent at the time Trustee's Exhibit 10 was written, it would have been foolish for Reliance to require McKee to go through "an idle and fruitless ceremony." Therefore, Reliance directed McKee to effect its setoff "forthwith."<sup>5</sup>

The trustee's "legal disability" argument in relation to the applicability of Arizona's *Pain v. Packard* statute is unsound. That portion of the statute relating to the obligee's "legal disability" refers to the remedy available to the surety in the event such an "action upon the contract" is not brought. Since no action was brought, for the reasons given above, no permission was needed from the Bankruptcy Court to effect the setoff under Section 68 of the Bankruptcy Act.

The trustee has attempted to limit Reliance's right to require the setoff as arising ~~solely~~ out of its right of "subrogation". This is no doubt based upon the use of the word "subrogation" by Reliance in Trustee's Exhibit 10 (See Appellee's Br. 23-24). The word "subrogation" has a variety of meanings. It has been described as an equitable remedy or a right implied by operation of law. It occurs as a matter of right, independent of agreement. *Black's Law Dictionary*, 4th ed., pages 1595-1596.

It should be obvious that the word "subrogation" used in the context of Trustee's Exhibit 10 would not automatically exclude

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<sup>5</sup>Trustee's Exhibit 10 reads as follows: "Reliance claims that McKee should make payment of Fike's obligations for labor and materials on the Lincoln Hospital project and should ~~forthwith~~ offset the moneys due under Fike's contract on the Tucson House project, to the extent available, against its claim against Fike on the Lincoln Hospital project" (Emphasis added). In view of the use of the word "forthwith", we are somewhat perplexed over the trustee's citation of two Indiana decisions having to do with the leaving out of the word "forthwith" (Appellee's Br. 25).

Reliance's statutory rights under Arizona Revised Statutes §12-1641. This is a case of substance prevailing over form, and certainly the trustee does not claim that Reliance has waived its statutory right by virtue of its use of the word "subrogation". Indeed, Reliance's right of subrogation has never arisen in this case, at least in regard to the monies in question; and as previously pointed out, Reliance is not a party to this lawsuit.

One blatant error made by the trustee must be corrected at this time. The trustee has stated on at least two occasions in his brief (Appellee's Br. 6, 23) that Mr. Haug, admittedly the attorney for Reliance throughout the period involved in this litigation, was also representing McKee at the time Trustee's Exhibit 10 was prepared. There is absolutely no evidence in the record to prove this statement, and in fact, at the time Trustee's Exhibit 10 was prepared, McKee was represented by capable independent counsel.<sup>6</sup> For the trustee, at this late date, to accuse counsel for appellants of a gross conflict of interest is the ultimate in attempting to shift the Court's attention from the true issues of this case.

**3. Appellee's argument concerning the setoff of partnership debts ignores the fact that McKee's debt, if not individually owed, was owed jointly and severally.**

The trustee has attempted to dismiss appellants' argument that a joint venture was not actually formed, with the unwarranted charge that appellants' argument "borders on the criminal." (Appellee's Br. 16). Instead of devoting attention to the legal issues involved, the trustee has chosen to use this personal attack to cover up the weakness of his legal argument.

That the "joint venture agreement" was entered into to give Robbins and Schiff the requisite identity of interest for FHA purposes has been previously explained (Appellants' Br. 15-19).

<sup>6</sup>Eugene R. Smith, Senior partner in the firm of Kemp, Smith, Brown, Goggin & White of El Paso, Texas, specializing in fidelity and surety matters.

The FHA did not require that a joint venture be formed. Such a method was chosen by McKee and its counsel in order to make Robbins and Schiff jointly liable along with McKee for the payment of any subcontracts, including Fike's, on the Tucson House project. This had the effect of giving Robbins and Schiff a sufficient identity of interest for them to obtain a builder's and sponsor's profit and risk fee of 10% and make the project feasible (T.I 54-57). But there was no doubt in anyone's mind that McKee was to do the actual contracting work for the beneficial owners, Robbins and Schiff.

McKee agreed to indemnify fully Robbins and Schiff from any losses which they might suffer as a result of the "joint venture", and from the evidence it is clear that Robbins and Schiff obtained no ownership interest in the construction contract. In fact, the monies in question due to Fike were clearly to come from McKee's payment as spelled out in Trustee's Exhibit 2 (T.I 57, 61-62).

Appellants quite agree with the quote cited by the trustee from the case of *Mercer v. Vinson* (1959) 85 Ariz. 280, 287, 336 P.2d 854 (Appellee's Br. 16). It has always been the appellants' position that the facts disclose that a true joint venture was never formed.

Even if it be assumed, for the sake of argument, that a joint venture was formed, it is clearly the law that McKee's obligation is joint and several (Appellants' Br. 21). Indeed, the trustee has never argued nor cited any cases for the proposition that McKee's debt was not a joint and several debt. Instead the trustee has apparently elected to skirt this vital issue by citing several cases which hold that a joint debt cannot be set-off against a several or individual debt.

It is understandable that the trustee would like to change the issues in this case in order that the law he has cited may become applicable. Appellants have cited many cases for the proposition

that a joint and several debt may be set-off against an individual debt (Appellants' Br. 22-23). Appellants have also cited a recent bankruptcy case wherein a joint and several debt was permitted to be set-off against an individual debt, the exact situation which now confronts us. *In re Sherman Plastering Co.* (2d Cir. 1965) 346 F.2d 192. The trustee, on the other hand, has not cited a single case, bankruptcy or otherwise, which declares that a joint and several debt may not be set-off against an individual debt, or, to be more specific, which holds that a joint and several debt due a bankrupt from a partnership or joint venture may not be set-off against a debt due from the bankrupt to an individual member of such partnership or joint venture.

The *Sherman* case involves a fact situation very similar to the case at bar. As the diagram on page 27 of Appellants' brief graphically demonstrates, Hanover owed its debt to the bankrupt Sherman jointly and severally. McKee likewise, if a joint venture was actually formed, is obligated to the bankrupt Fike jointly and severally. Hanover also owned its debt from Sherman individually, and similarly, McKee owns its debt from Fike on the Lincoln Hospital project individually. The trustee does not take issue with the *Sherman* decision, which holds that a joint and several debt may be set-off against an individual debt. Therefore it is difficult to follow the trustee's logic in asserting that a setoff cannot be allowed McKee.

It is also interesting to note that the case of *In re Neaderthal* (2 Cir. 1915) 225 Fed. 38, formerly cited by the trustee in support of his argument (R. 17), and mentioned in the quote on page 19 of appellee's brief, was specifically overruled by the Second Circuit in the *Sherman* case to the extent that it be interpreted as disallowing a setoff in a situation amounting to the "reciprocal" of the facts in the *Sherman* case. The trustee has apparently abandoned the *Neaderthal* case, but still clings to his case authorities which stand for the proposition that a joint debt



(but not a joint and several debt) cannot be setoff against a separate debt (Appellee's Br. 17).

**4. Appellee's trust fund theory is without factual or legal support and is not relevant in any event.**

Appellants' position in regard to the appellee's trust fund argument has been previously set forth (Appellants' Br. 28-32). This is the trustee's second-string argument for denying appellants' setoff. It should be obvious, however, that if McKee has a right of set-off, there should be no question that it would be allowed to mechanically accomplish the setoff, and the trustee's "trust theory" becomes an irrelevant truism.

It is contended that a trust fund did exist herein by virtue of the bankrupt's filing a Notice and Claim of Lien. Yet this erroneously presupposes that a valid lien was created in favor of Fike. Thus, the very foundation of the trustee's argument is based upon a non-existent presupposition—a validly perfected lien—and the argument must fall of its own weight.

The cases the trustee cites to support his trust theory deal with states having mandatory retention statutes, and they presuppose a valid lien. Indeed, it is difficult to conceive of a case which would allow a trust fund to be established on the basis of an invalid lien. The trust theory in the instant case is further irrelevant for the reason that McKee was not obligated to pay Fike out of the retention monies it received.

It must also be pointed out that the trustee has elected to go outside the record with his statement that McKee knew of the existence of the lien "all along" (Appellee's Br. 21). This statement is untrue even by the trustee's own version of the facts (Appellee's Br. 4). The uncontroverted evidence shows that neither Tucson Title Insurance Company nor McKee became aware of the lien's existence until December, 1964 (T.I 10, 120-123; Respondents' Exhibit 11).

### 5. Interest and attorney's fees.

The trustee has apparently missed the point of appellants' argument in regard to the interest allowed by the Referee. Appellants do not challenge the awarding of interest per se, only the date from which the interest was awarded.

Clearly it would have been impossible for appellants to determine accurately the amount which might eventually have to be spent on warranty items on the Tucson House project at the time final payment was received from the owners on December 11, 1964. It defies all logic for the trustee to claim that he is entitled to interest from the period thirty days after the receipt of final payment from the owners, when the one-year warranty did not commence until after the *completed contract*, which would include the receipt of final payment from the owners.

In regard to the matter of attorney's fees, appellants are willing to concede that in the Federal Court no evidence is required as to the quantum of the fee when the fee is set by the trial judge who hears the case. Appellants persist in their argument, however, that the Referee in Bankruptcy was without jurisdiction to make such an award under our particular fact situation (Appellants' Br. 39-40). If, however, this Court decides that attorney's fees may be awarded, we would remind the Court that they may modify the attorney's fee award in any manner [*Curran v. Security Insurance Company* (D. C. Ark. 1961) 195 F. Supp. 562], and further that appellants, in the event they are successful in this appeal, also claim attorney's fees upon the same basis as the trustee (Trustee's Exhibit 3; Appellee's Br. 3).

**CONCLUSION**

Based on the foregoing, and on the arguments contained in appellants' opening Brief, it is respectfully submitted that the District Court's order affirming the Referee's turnover order be reversed, that McKee's right of set-off be established, that the warranty period be established as expiring not prior to December 11, 1965, that the trustee be denied attorney's fees, and that the cause be remanded with instructions to fix the exact amount owing to the trustee.

JENNINGS, STROUSS,  
SALMON & TRASK

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October, 1966

I certify that in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those Rules.

William F. Haug

















